

PRESUMPTIONS AND THEIR TREATMENT UNDER THE LAW OF OHIO

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Learned judges, professors of law prominent in the field of evidence, and distinguished lawyers have for some time grappled with the subject of presumptions in an effort to bring some order from the confusion which has plagued the law on this topic. "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."¹

"I have been converted, reconverted, unconverted, deceived, disillusioned and had all sorts of things done to me in this field," said Judge Augustus Hand after listening to a heated debate at a conference of the American Law Institute on a proposed rule for proper treatment of presumptions in the trial court. At a later meeting a different rule on the same problem was offered, wrought by the efforts of the Institute's distinguished evidence committee, which consisted of twelve outstanding judges and law teachers and more than seventy consultants, with Professor Wigmore as the chief consultant. Differences of opinion on the proposed rule were sharp and unsuppressed. When the rule was offered and hotly debated, the patience of Learned Hand reached its limit:

I am quite sure he [the reporter, Professor Morgan] is wrong but it is no use to ask him to go over it again. We have been over it ad nauseam. We spent days on it. The responsibility is yours. You are the final word on this. Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't care much what it is. I am beaten and through with it and for myself I am frank to say I am not going to do anything

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¹ Morgan, "Presumptions," 12 Wash. L. Rev. 255 (1937).

more with it. You can refer it back but you won't get a lick of work out of me on it.²

The hope of this article is to provide some clarification of the law on this perplexing topic which has challenged judges in quest of a just rule for the proper treatment of presumptions by trial courts.

WHAT ARE PRESUMPTIONS?

There are scores of presumptions in the law, any one or more of which may appear in a lawsuit, and the improper introduction, omission, or removal of a presumption into or from a lawsuit may decide its outcome. The frequent loose and indiscriminate use, as well as the outright misuse, of the term "presumption," has caused needless confusion. It has often been used to designate what are more accurately termed inferences or substantive rules of law. It has also been employed by courts as a loose synonym for presumption of fact, presumption of law, rebuttable presumption, and irrebuttable presumption.

One commonly accepted definition is that "'presumption' may . . . be used to designate the assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone."³ Authorities call these later facts or groups of facts, which result in the assumption of the presumed fact, the basic facts.⁴ Thus, if the basic facts of (A), a marriage, and (B), birth of a child to the wife during wedlock, are established, the court will assume the presumed fact, (C), that the child is legitimate. Once the basic facts are established, in the absence of adequate rebuttal evidence contrary

² Quoted in Hellman, "Presumptions," 22 Can. B. Rev. 118, 133 (1944).

³ Morgan, "Some Observations Concerning Presumptions," 44 Harv. L. Rev. 906 (1931).

⁴ With regard to most presumptions it is necessary to establish the basic facts before the presumed fact in the presumption can come into existence. This may be accomplished by admissions or stipulation during trial, through the pleadings, by judicial notice, by interrogatories, by evidence entitling the party seeking the use of the presumption to a directed verdict as to the basic facts, or by satisfying the trier of fact by the required proof that the basic facts exist. Of course, there may be some argument as to what the basic facts in a particular presumption are. See *Egger v. Northwestern Mut. Life Ins. Co.*, 203 Wis. 329, 234 N.W. 328 (1931); *Hansen v. Central-Verein*, 198 Wis. 140, 223 N.W. 571 (1929); *Ewing v. Metropolitan Life Ins. Co.*, 191 Wis. 299, 210 N.W. 819 (1926).

There are, however, a few presumptions that automatically make their appearance without proof at the commencement of trial because the court takes judicial note of them. Examples include the presumption of sanity of the accused in a criminal case, the presumption of good reputation of the plaintiff in a libel suit, and the presumption of innocence.

to the presumption, the trier of fact, be it judge or jury, is compelled to find the presumed fact.⁵

In 1898 a great authority on evidence wrote that, "Presumption, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument."⁶ "Thayer, Wigmore, the American Law Institute, and commentators generally have argued, and many courts have agreed, that the term 'presumption' should be used only to mean that when *A* is established in an action, the existence of *B* must be assumed unless and until a specified condition is fulfilled. All courts agree that 'presumption' is properly used in this situation, but there is wide disagreement as to the terms of the condition."⁷

Is a Presumption Evidence?

All competent evidence pertinent to a fact in issue must go to the trier of fact. If a presumption is evidence it should not evaporate upon the introduction of any rebuttal evidence which is contrary to the presumed fact. If it does automatically vanish upon the entry of such evidence, the jury cannot consider it, since logically it is nonexistent.

Almost all legal scholars and commentators agree that a presumption is not properly termed "evidence."⁸ On this point Thayer, Wigmore, and Morgan are in full accord.⁹ Despite this scholarly consensus that presumptions are not evidence in the true sense of the word, there is law, both legislative and judicial, rebelling against the idea that presumptions born out of strong policy are to be easily eliminated by rebuttal evidence. The effect of such law is to treat presumptions as evidence or in the nature of evidence or as having the effect of evidence, thus avoiding a directed verdict with

⁵ See *Carson v. Metropolitan Life Ins. Co.*, 165 Ohio St. 238, 135 N.E.2d 259 (1956).

⁶ Thayer, *Preliminary Treatise on Evidence* 315 (1898).

⁷ Morgan, "How to Approach Burden of Proof and Presumption," 25 *Rocky Mt. L. Rev.* 34, 43 (1952).

⁸ A presumption is not evidence and is not to be weighed as evidence. *Carson v. Metropolitan Life Ins. Co.*, *supra* note 5. Maguire struck at the jugular when he pointed out that "by very definition a presumption means to us a *rule about the effect of evidence*, and not evidence *per se*." Maguire, *Evidence, Common Sense & Common Law* 190 (1947). "Presumptions are not evidence. Presumptions effect only the burden of offering evidence." Tracy, *Evidence* 30 (1952).

⁹ "To consider a compelled assumption as evidence or to weigh it with evidence seems to involve a mental operation impossible of practical comprehension, to say nothing of understandable exposition or explanation to a jury." Morgan, *supra* note 3, at 908. See Thayer, *op. cit. supra* note 6, at 314-15; 9 Wigmore, *Evidence* § 2491 (3d ed. 1940); McBaine, "Presumptions, Are They Evidence?" 26 *Calif. L. Rev.* 519 (1938). See also Note, "Evidence: Presumptions as Evidence—A Reply," 31 *Calif. L. Rev.* 316 (1943).

regard to the presumed fact and often requiring that the jury be instructed to weigh the presumption with the other evidence in the case.¹⁰ Some courts have held that a presumption remains in the case until the jury has decided that the evidence of the opponent on the presumed fact is equal to or countervails the presumption.¹¹

One commentator expresses the view that anything occurring at trial which might influence the ultimate judgment of the jury, whether or not evidence in the strict sense, could properly be regarded as evidence or its equivalent. Accordingly, he argues, an instruction by the court as to the creation of the presumption and the reasons underlying it might influence the ultimate judgment of the jury. As such it acts as evidence.¹² Of course, those decisions prohibiting mention of the presumption by the court in its charge once the presumption vanishes by virtue of adequate contrary evidence would exclude this factor from the consideration and ultimate judgment of the jury.

By legislation, California,¹³ Oregon,¹⁴ and Montana,¹⁵ in defining evidence, have included presumptions. The result has been that presumptions cannot ordinarily be liquidated by rebuttal evidence; accordingly, they must go to the jury.

¹⁰ See Morgan, *supra* note 3, at 908 nn.5 & 6 for numerous cases cited as examples, where at one time or another presumptions were regarded as evidence. See also *New York Life Ins. Co. v. Beason*, 229 Ala. 140, 155 So. 530 (1934); *Mutual Life Ins. Co. v. Maddox*, 221 Ala. 292, 128 So. 383 (1930); *Arkmo Lumber Co. v. Luckett*, 201 Ark. 140, 143 S.W.2d 1107 (1940); *Aetna Life Ins. Co. v. Taylor*, 128 Ark. 155, 193 S.W. 540 (1919); *O'Brien v. New England Mut. Ins. Co.*, 109 Kan. 138, 197 Pac. 1100 (1921); *Exkendorf v. Mutual Life Ins. Co.*, 154 La. 183, 97 So. 394 (1923); *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939).

¹¹ *Speck v. Sarver*, 20 Cal. 2d 585, 128 P.2d 16 (1942); *In re Rohde's Estate*, 158 Cal. App. 2d 19, 323 P.2d 490 (Ct. App. 1958); *Savarese v. State Farm Mut. Auto Ins. Co.*, 150 Cal. App. 2d 518, 310 P.2d 142 (Ct. App. 1957); *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 124 P.2d 579 (1942); *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P.2d 27 (1944); *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 83 S.W.2d 251 (1935). See also Note, "Insurance—Presumption Against Suicide and Burden of Proof," 14 Tenn. L. Rev. 45 (1934). Concerning the presumption against suicide, New York has held, "nor is it the sort of 'presumption' that serves only to shift the burden of proof and disappears from the case as soon as evidence to the contrary is shown." *Wellish v. John Hancock Mut. Life Ins. Co.*, 293 N.Y. 178, 184, 56 N.E.2d 540, 543 (1944). This was also the law in Ohio until *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E.2d 401 (1957).

¹² See Reaugh, "Presumptions and the Burden of Proof," 36 Ill. L. Rev. 819 (pt.2 1942).

¹³ Cal. Code Civ. Proc. §§ 1957, 1961, 2061.

¹⁴ Ore. Rev. Stat. §§ 41.040, 41.080, 41.310 (1963).

¹⁵ Rev. Codes of Mont. tit. 93-301-5, -301-10 (1947).

Terms Erroneously Treated as Synonymous with Presumption Inference

Although sometimes a presumption encompasses, or is based upon, an inference, the two terms are not synonymous. A presumption is a mandatory deduction or assumption, while an inference is a permissible deduction. Thus, "an inference is a deduction of an ultimate fact from other proved facts, which proved facts, by virtue of the common experience of man, will support but not compel such deduction. A jury may attach probative value, or evidentiary weight, to such a deduction in the same manner and to the same extent it may accept, reject or attach probative value to positive testimony or direct evidence."¹⁶

The carelessness with which courts have used the terms is well illustrated by three Ohio cases in which the same process was designated differently without regard to the important, different procedural effects of the term employed. With regard to an accepted presumption of agency, one court called it an "inference,"¹⁷ another called it a "presumption,"¹⁸ and a third called it a "presumption or inference" in the opinion and a "presumption" in the syllabus.¹⁹ Whether, given certain basic facts, a presumption or inference arises must be decided from the cases in the particular jurisdiction; and often there is no unanimity in the jurisdiction or among the various state courts as to whether an inference or presumption result under particular facts.

Conclusive or Irrebuttable Presumption

This term has been used "as the operative part of a weasel-worded formula for saying that from the judicial or legislative point of view certain things are taken as so and attempts to contradict them are futile."²⁰ This simply means that the legislature or court, for reasons of public policy or expediency, has made the basic fact equivalent to the presumed fact. The presumed fact becomes undebatable and cannot be refuted by any evidence. Common examples include the presumption of a lost grant in favor of a person adversely possessing land over a long period of time, or the presumption in some states that a child under a certain age cannot commit a felony.

¹⁶ *Ayers v. Woodard*, 166 Ohio St. 138, 145, 140 N.E.2d 401, 406. The court cites *Fink v. New York Cent. R.R.*, 144 Ohio St. 1, 56 N.E.2d 456 (1944); *Glowacki v. Northwestern Ohio Ry. & Power Co.*, 116 Ohio St. 451, 157 N.E. 21 (1927); and *Sobolovitz v. Lubric Oil Co.*, 107 Ohio St. 204, 140 N.E. 634 (1923), to support its statement.

¹⁷ *Rosenberg v. Reynolds*, 11 Ohio App. 66 (1918).

¹⁸ *Schmidt & Schmidt v. Schwab*, 17 Ohio App. 127 (1922).

¹⁹ *Fach v. Canton Yellow Cab Co.*, 36 Ohio App. 247, 173 N.E. 245 (1929).

²⁰ Maguire, *Evidence, Common Sense & Common Law* 185 (1947).

Another example appears in the Negotiable Instruments Law, which provides that where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.²¹ It is immaterial that the maker can prove that the note was lost or stolen from him by the payee, since by virtue of the statute, want of delivery is no defense against a holder in due course. The new Commercial Code has recognized this evidentiary guise for a substantive rule of law by eliminating the word "presumption" and merely stating that a holder in due course "takes the instrument free from . . . all defenses of any party to the instrument with whom the holder has not dealt . . ." with some enumerated exceptions.²²

Presumption of Fact

The term "presumption of fact" is a synonym for "inference." Inaccurately, the Ohio Supreme Court once called a simple inference a "presumption in fact as well as law"²³ when a witness within the control of a party was not called to testify nor his absence explained. Under those facts the jury might infer that his testimony would be unfavorable. This is not a presumption of law. Careful analysis reveals that the proper term here is "inference."²⁴

Presumption of Law

This term should not be used because it is misleading. Whenever it is used, it refers either to a rebuttable presumption or a substantive rule of law. For example, for years in some Ohio courts in cases involving the issue of negligence, the court needlessly and erroneously charged the jury, "that at the outset and for purposes of the trial, the law presumes that the defendant was not negligent in any manner, and before it can be found by you that the defendant was negligent in any manner, it must be proven against the defendant by the greater weight of the evidence." This so-called "presumption of no negligence" is not a presumption. Its office is locative and it is nothing but a substantive rule which fixes the burden of proof of negligence on the plaintiff and operates against him if he has failed to introduce evidence of negligence. In *Wolf v. Hawk*,²⁵ although the court loosely labelled the presumption of no negligence a "presumption of law," it correctly treated it as a substantive rule and held that, after the plaintiff introduced some evidence on the issue of negligence, the presumption had "no place

²¹ Uniform Negotiable Instruments Law § 16.

²² Uniform Commercial Code § 3-305.

²³ *State v. Champion*, 109 Ohio St. 281, 289, 142 N.E. 141, 143 (1924).

²⁴ See *Morgan*, *supra* note 7, at 43.

²⁵ 63 Ohio App. 122, 25 N.E.2d 460 (1939).

in a charge to the jury. . . . It . . . determines the issue in the absence of evidence, and is solely for the consideration of the court.”²⁶ The court pointed out that “after the introduction of evidence of probative value on an issue of negligence, the presumption of law no longer prevails.”²⁷

Another substantive rule often incorrectly called a presumption relates to the presumption of due care on the issue of contributory negligence. However, the defendant already has the burden of proof on the issue of contributory negligence,²⁸ consequently, once he has introduced evidence on that issue, the “presumption” of due care on the part of the plaintiff “is like a handkerchief thrown over something also covered by a blanket.” A Minnesota court made the same analysis.²⁹

The confusion that results from expressing substantive rules of law in the form of presumptions was long ago expressed by Thayer, who observed:

At the outset, we must take notice of a thing which easily escapes attention: namely, that much of the substantive law is expressed presumptively, in the form of *prima facie* rules. This evidential form of statement leads often to the opinion that the substance of the proposition is evidential; and then to the further notion, that inasmuch as it is evidential, it belongs to the law of evidence. This is error.³⁰

EXAMPLES OF TRUE PRESUMPTIONS AND THE REASONS FOR THEIR CREATION

It might prove helpful to set forth a few well-known examples of rebuttable presumptions, the genuine type and the only kind hereafter treated, with the reasons for their creation. They are not alike, despite a strong tendency by courts and some commentators

²⁶ *Id.* at 124, 25 N.E.2d at 461-62.

²⁷ *Ibid.* Other courts have likewise recognized that presumptions of this variety are correctly only rules of law locating the burden of persuasion (“proof”) or the burden of producing evidence upon penalty of non-suit, and that once evidence pertinent to the non-existence of the presumed fact is introduced, the “presumption” is gone for all purposes. See *Bailey v. City of Ravenna*, 280 Ky. 21, 132 S.W.2d 532 (1939) (presumption of validity of ordinance); *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907) (presumption against malpractice); *Yeary v. Holbrook*, 171 Va. 266, 198 S.E. 441 (1938) (presumption against negligence); see also Thayer, *op. cit. supra* note 6, at 339, 346; Laughlin, “In Support of the Thayer Theory of Presumptions,” 52 Mich. L. Rev. 195 (1953).

²⁸ See *Brown v. Henderson*, 285 Mass. 192, 189 N.E. 41 (1934) (Lummus, J., concurring).

²⁹ *TePoel v. Larson*, 236 Minn. 482, 53 N.W.2d 468 (1952).

³⁰ Thayer, *op. cit. supra* note 6, at 185.

to treat them alike procedurally. "Presumptions are created for different reasons and might logically enough be tough or tender according to the nature and force of those reasons."³¹

The examples represent rebuttable presumptions which the law designed for one or more of the following reasons: (1) as procedural conveniences, (2) to dissolve a legal impasse, (3) to satisfy a deep-rooted social need, (4) because experience demonstrated their inherent probability, or (5) because the facts were within the peculiar knowledge of the opponent of the presumption.

(A) *The Presumption of Liability of a Bailee.*

Plaintiff-owner parks his automobile in a parking lot; he leaves the keys in the ignition and pays the operator of the lot. Upon his return the automobile is missing. The operator contends that he was in constant attendance but cannot account for the car's disappearance. The owner sues the operator for its loss, alleging negligence. Here the burden of proving negligence is on the owner. But how can he sustain his burden? He does not know the circumstances surrounding the loss or theft; it would be difficult for him to disprove the contentions of the operator. The law has come to the owner's rescue with a presumption, without which recovery might be impossible: where property is delivered to a bailee, and the bailee on demand fails or refuses to deliver it to the bailor, a presumption of liability on the part of the bailee arises.³²

Thus, if the owner establishes the basic facts of delivery of the automobile to the operator, demand for its return, and failure or refusal of the operator to return it, the court must, in the absence of adequate rebuttal testimony, direct a verdict for the owner on the issue of negligence. This presumption was devised to assist the owner on the issue of negligence when all he could probably do, having no knowledge of what happened in his absence, is prove his car was not there when he sought to claim it. The facts concerning the care of the operator and the circumstances surrounding the loss are more accessible to the operator than the owner.

(B) *The Presumption of Agency.*

O owns a truck and hires S, his servant, to drive it. While S is operating it he injures T, who sues O. The accident occurs at an hour which may either be within S's working hours or while S is on a "frolic of his own." T must prove, among other things, that the tort was committed within the scope of S's employment. O denies agency.

³¹ Maguire, *Evidence, Common Sense and Common Law* 185 (1947).

³² *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 58 N.E.2d 658 (1944).

Here, the facts are within the peculiar knowledge of *S* and *O*. Unaided by presumption and having no evidence on authority, *T* would suffer a directed verdict on the issue of agency. Since it is probable that a servant, hired for that purpose, while driving the owner's car, is working for the owner at the time of the accident, and since *O* and *S* know better than *T* whether *S* was then at work in behalf of *O*, the law has declared that a presumption arises that the servant was acting within the scope of his authority.³³ The justifications for this presumption are, first, accessibility of facts and, second, probability or common experience.³⁴

(C) *The Presumption of Death After Seven Years Absence.*

A, the assured, left home and was unexplainedly not heard from for more than seven years. He has a small estate and a life insurance policy. His wife has no means of knowing if he is still alive. As it is a sound policy not to leave *A*'s assets unsettled indefinitely, the law found fit to provide that, if one leaves his usual place of residence and goes to parts unknown or a distant place, and is not heard from for a period of seven years, a presumption arises that he is dead.³⁵

(D) *Presumption of Innocence.*

A, the accused, is tried for murder. His defense is insanity. It is axiomatic that the accused must be proved guilty beyond a reasonable doubt of all the essential elements of the offense, including an intent to commit it. It is equally clear that the accused, if devoid of reason, is incapable of forming the requisite criminal intent. However, practically all courts reason that, since most men are normally sane and it would needlessly entail a great expenditure of time and expense to prove sanity in every criminal case, the accused will be presumed to be sane. Following an often adopted rule, Ohio invokes the presumption, and adds that insanity is an affirmative defense which casts the burden of proof of that issue on the accused.³⁶

³³ *Fiocco v. Carver*, 234 N.Y. 219, 137 N.E. 309 (1922); *Fach v. Canton Yellow Cab Co.*, 36 Ohio App. 247, 173 N.E. 245 (1929); *Schmidt & Schmidt v. Schwab*, 17 Ohio App. 127 (1922); *Rosenberg v. Reynolds*, 11 Ohio App. 66 (1918).

³⁴ "A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth." *Greer v. United States*, 245 U.S. 559, 561 (1917).

³⁵ See, e.g., *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 84 N.E.2d 504 (1949).

³⁶ In view of the Ohio law and those jurisdictions that follow it, the presumption of sanity can create a state of confusion which would challenge not only the most intelligent juror, but judges and attorneys as well. With regard to the defense of insanity, "the burden is upon such defendant to establish such defense by a pre-

THE RELATIONSHIP BETWEEN PRESUMPTIONS AND THE
BURDEN OF PROOF: TWO CONFLICTING VIEWS

Presumptions cannot be discussed abstractly or in isolation. Despite the fact that they are two distinct legal concepts, presumptions are inseparably integrated with burden of proof. The conflicting decisions and resulting ambiguities concerning presumptions are a result of this relationship. They occur because courts have carelessly used the term "burden of proof" to denote either of two burdens which are different and also because there is sharp disagreement as to the effect of a presumption on the burden of proof.

The term "burden of proof" has been used in two distinct senses. In the first sense, burden of proof is the risk of non-production of evidence to make a *prima facie* case. According to the Model Code of Evidence, the "burden of producing evidence of a fact" means the burden which is discharged when sufficient evidence is introduced to support a finding that the fact exists."³⁷ Burden of proof in the second sense is the burden of persuasion, which is defined as follows: "burden of persuasion of a fact" means the burden which is discharged when the tribunal which is to determine the existence of the fact is persuaded by sufficient evidence to find that the fact exists."³⁸

A hypothetical set of facts will bring into bold relief the

ponderance of the evidence. This does not, however, relieve the state of the general burden to prove each and every element going to make up the offense charged by proof beyond a reasonable doubt." *Long v. State*, 109 Ohio St. 77, 141 N.E. 691 (1923). For example, the state, at the commencement of the trial, has the benefit of the presumption that the accused is sane. Under *Ayers v. Woodard*, *supra* note 11, if the accused introduces substantial credible evidence of insanity, the presumption disappears; the state must then prove the sanity of the accused as well as every element of the offense, including intent (and the capacity to form an intent) beyond a reasonable doubt. On the other hand, insanity, under the Ohio law, is an affirmative defense and the accused has the burden of proving that issue by a preponderance of evidence. Legal insanity precludes the capacity to form that intent required under the law to convict the accused. The following awkward, difficult, and incomprehensible situation ensues for the judge and jury. If the judge decides the presumption of sanity has disappeared, the state must prove the accused sane beyond a reasonable doubt; it must also prove intent to commit the offense beyond a reasonable doubt. On the other hand, if the judge rules the presumption has not been destroyed by the contrary evidence of the accused, the state is still obligated to prove intent (which presupposes capacity to form an intent) beyond a reasonable doubt. And the accused need prove insanity (which precludes capacity to form an intent) by a preponderance of the evidence. How can a juror intelligently understand and apply the pertinent instructions covering the situation? In the case of *City of Toledo v. Gfell*, 107 Ohio App. 93, 95, 156 N.E.2d 752, 753 (1958), the court held that the rule with regard to presumptions announced in *Ayers v. Woodard*, *supra*, "would apply with equal cogency to the trial of criminal cases."

³⁷ Model Code of Evidence rule 1(2) (1942).

³⁸ Model Code of Evidence rule 1(3) (1942).

problems of presumption, burden of proof, and the effect of the presumption on burden of proof. Let us assume that *W*, a wife, sues *X* insurance company on a 10,000 dollar life insurance policy issued on the life of her husband, *H*, designating *W* as the beneficiary. The policy provides for double indemnity in case of accidental death. *W* seeks 20,000 dollars, alleging *H*'s death was accidental. *X* denies the death was accidental and in its answer alleges that the death was suicidal; further, that except for the fraudulent material misrepresentations of *H*, it would not have issued the policy.

Lawyers know the general rules, which hold that: (1) *W*'s petition must allege facts constituting her cause of action; (2) *X*'s answer can deny allegations in *W*'s petition, but must ordinarily plead the facts constituting an affirmative defense; (3) when death occurs under circumstances which make it doubtful whether it was caused by accident or suicide, the presumption is that it was accidental; (4) *W* has the initial duty of producing evidence that *H* died accidentally; (5) *W* also has the ultimate burden of persuading the trier of the facts that the death was accidental; (6) *X* has the initial duty of producing evidence that the policy was issued as a result of fraudulent and material misrepresentations by *H*, as well as the ultimate burden of persuading the trier of the facts that the policy was issued as a result of such misrepresentations.

Our major question here is whether, once the presumption of accidental death appears, *X* has to prove *H*'s death was suicidal and not accidental. What principle of law determined 1, 2, 4, 5, and 6? And what principle answers our anterior, major question? ³⁹

³⁹ Is there one rule of law which will guide the court in deciding which party has the initial burden of pleading and the burden of proof (in its double sense) as to each issue in the case? The answer is no! One commentator has stated,

There is . . . no key-principle which governs the apportionment of the burden of persuasion. In ascertaining the party who is to carry this burden, we can only look to the practice which the courts in the light of tradition and their notions of convenience, fairness and policy, have worked out in the particular type of case, for the . . . burden of persuasion.

McCormick, *Evidence* 675-76 (1954). "[I]t is at once apparent that no one universal solvent has been found for all cases. This is just as well, for none is necessary." Ray, "Burden of Proof and Presumptions," 13 *Texas L. Rev.* 33, 37 (1934).

Ohio provides that, "The party who would be defeated if no evidence were offered on either side, first, must produce his evidence, and the adverse party must then produce his evidence." Ohio Rev. Code Ann. § 2315.01(C) (Page 1953). "[This] . . . is rather a statement of the effect of a rule than an explanation of the principle underlying it." Hanbury, "The Burden of Proof," 61 *Juridical Rev.* 121, 130 (1949). Rather it is meaningless, for it aids neither court nor lawyer in determining who must first produce evidence and who has the ultimate burden of proving each issue upon penalty of dismissal. See also *Wige v. Mutual Life Ins. Co.*, 205 *Wis.* 95, 236 *N.W.* 534 (1931); Morgan & Maguire, *Cases on Evidence* 48 (3d ed. 1951).

W will suffer a directed verdict if, after she has rested her case and before the defendant puts on any evidence, she has not produced sufficient evidence to justify a finding in her favor by the jury. In such a case she will not have sustained the burden of proof in the first sense, that is, the burden of producing enough evidence to make a *prima facie* case. *W* will likewise fail if, when the case goes to the jury, she has failed to convince the jury that *H*'s death was accidental. In such a case *W* will not have sustained her burden of proof in the second sense, that is, the burden of persuasion.

We know that *W* is aided somehow by the rebuttable presumption against suicide upon a showing of death by external and violent means.⁴⁰ However, how and when is this done? ⁴¹ What effect does this rebuttable presumption of accident have on *W*'s burden of persuasion? It is the answer to such questions that has caused violent disagreement among commentators and contradictory decisions among courts.

All agree that, once the presumption comes into operation, the opponent must come forward with evidence to rebut the presumption: otherwise, the presumption is mandatory upon the jury. This refers solely to the duty of the opponent of the presumption to come forward with evidence contrary to the presumption in the area, although Thayer maintained that presumptions only "throw upon him against whom they operate, the duty of meeting this imputation, on the particular point to which they relate This appears to be the whole effect of a presumption, and so of a rule of presumption."⁴² With respect to the burden of persuasion, or burden of proof in the second sense, however, there is no strict uniformity among jurisdictions concerning the effect of presumptions.

One extreme, as noted, is the Thayer view, now reflected in rules 701-704 of the American Law Institute's Model Code of Evidence.⁴³ These rules provide that, except for the presumption

⁴⁰ Ohio Rev. Code Ann. § 2309.29 (Page 1953) provides, "Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading. . . ." This dispenses with the necessity of pleading the presumption; only the basic fact or facts need be pleaded. However, the presumed fact could be pleaded and proved by evidence of the basic facts which give rise to the presumption.

⁴¹ See *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F.2d 724 (4th Cir. 1935); *Carson v. Metropolitan Life Ins. Co.*, *supra* note 5.

⁴² Thayer, *op. cit. supra* note 6, at 336.

⁴³ Rule 701. Definitions.

(1) Basic fact—Basic fact means the fact or group of facts giving rise to a presumption.

(2) Presumption—Presumed Fact—Presumption means that when a basic fact exists the existence of another fact must be assumed, whether or not the other fact

of legitimacy, a presumption disappears upon the introduction by the opponent of evidence which would support a finding of the non-existence of the presumed fact. This one rule for all presumptions has been applied by many courts. Neither Thayer nor the Model Code states how much and what quality evidence the opponent must produce to effect this.

Although Thayer's analysis has not always been accepted unqualifiedly, the gist of the argument advanced by his supporters, who maintain that a presumption ceases to exist upon proof of rebuttal evidence, is generally as follows: each party has two burdens, the burden of producing evidence to avoid a directed verdict, and the burden of persuading the jury to grant him a verdict. With respect to the first burden, a presumption imposes on the opponent only the duty to introduce *some* evidence contrary to the presumption which would justify a finding in his favor. The evidence to be produced by the opponent to liquidate the presumption, depending on the law of the particular jurisdiction, must be such as to "support a finding of the non-existence of the presumed fact," "adequate," "any," "substantial," "credible," "substantial credible," or "some." Once such evidence is produced the presumption has accomplished its purpose and it leaves the lawsuit. The presumption, having made its exit, should not then be mentioned to the jury. It is not evidence and cannot thereafter be weighed with the evidence of the proponent of the presumption.

may be rationally found from the basic fact. Presumed fact means the fact which must be presumed.

(3) Inconsistent presumptions—Inconsistent presumptions means presumptions the presumed fact of one of which is inconsistent with the presumed fact of the other.

Rule 702. Establishment of Basic Fact.

The basic fact of a presumption may be established in an action by the pleadings, or by stipulation of the parties, or by judicial notice, or by evidence which compels a finding of the basic fact, or by a finding of the basic fact from the evidence.

Rule 703. Presumption of Legitimacy.

Whenever it is established in an action that a child was born to a woman while she was the lawful wife of a specified man, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond reasonable doubt that the man was not the father of the child.

Rule 704. Effect of Presumptions.

(1) Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until either evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

(2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.

Thayer's followers argue further, that the second burden, the burden of persuasion as to any issue, having been determined by the pleadings, can never shift from one party to the other during the lawsuit. It follows, then, that a presumption cannot shift that burden—that is, the opponent never inherits the burden of persuasion as a result of the presumption—and, a fortiori, a presumption no longer in the case is equally helpless to do so. However, the spectrum of application of this theory is varied.

In many cases, though the presumption has been dissipated, there often is a substantial logical connection between the basic fact and the presumed fact. Accordingly, the proponent of the presumption need not despair, for, if he has established the basic fact, he will get to the jury despite the death of the presumption, since the jury in such factual situations may infer the presumed fact from the basic facts. The court, in such a case, must submit to the jury for its determination the existence or non-existence of the presumed fact.

At the other extreme, farthest from the Thayer view, some hold that a presumption not only requires the opponent to come forward with evidence contrary to the presumed fact, but also shifts to the opponent the burden of persuading the trier of fact that the presumed fact does not exist.⁴⁴ For example, all agree that this occurs with regard to the presumption of legitimacy.⁴⁵ Most courts hold that the burden of persuasion is shifted to the proponent of a will by the presumption of undue duress resulting from a transaction involving a fiduciary who, as legatee under the will, has profited unjustly at the expense of the disinherited heirs who would normally be the natural objects of the testator's bounty.⁴⁶ Several states maintain that the same burden shifts to the opponent in bailment cases by virtue of the presumption of negligence. And Pennsylvania for a long time maintained that a presumption always shifted the burden of persuasion to the opponent—a position no longer followed in that state.⁴⁷

In the same vein, there is authority which holds that in automobile tort cases involving the issue of agency (or consent from the owner to the driver) a statutory presumption of consent does not vanish despite a denial of control or consent by the owner or the driver. There is also authority for the view that the presumption

⁴⁴ *Doud v. Hines*, 269 Pa. 182, 112 Atl. 528 (1921).

⁴⁵ *In re Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930).

⁴⁶ *Page v. Phelps*, 108 Conn. 572, 143 Atl. 890 (1928); *Soureal v. Wisner*, 321 Mo. 920, 13 S.W.2d 548 (1928). Ohio represents the minority view. See *Caswell v. Lermann*, 85 Ohio App. 200, 88 N.E.2d 405 (1948); *Board of Educ. v. Pendleton*, 80 Ohio App. 249, 75 N.E.2d 182 (1947); *Cave v. McLean*, 66 Ohio App. 196, 32 N.E.2d 581 (1939).

⁴⁷ See *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934).

of control survives and is available to the proponent until the jury finds "proven the circumstances of the situation with reference to the use made of the car and the authority of the person operating it to drive it. . . ."⁴⁸ In cases of this sort the presumption is equivalent to evidence, because it permits the plaintiff to go to the jury with nothing more.

Those who oppose the Thayer theory contend that every presumption has been created to serve a specific judicial or legislative need, purpose, or policy; and, since the reason or policy creating the presumption may be strong, the presumption should remain throughout the trial and be mentioned to the jury. There should be an instruction that, despite any rebuttal evidence (except evidence so clear as to require a directed verdict with regard to the presumed fact), the presumption should continue until the jury is satisfied that the non-existence of the presumed fact is as likely or probable as its existence. Some have even argued that a presumption should shift the burden of persuasion on the issue touched to the opponent.⁴⁹ The argument advanced here is that Thayer was basically wrong when he assumed that the burden of persuasion as to an issue can never shift in a lawsuit, and his tainted assumption has been cited and adopted by many courts, without analysis of its logic or validity, in the teeth of substantial precedent.

In my view, there is nothing talismanic in the argument that, because the pleadings initially determine the issues and the pleadings and substantive law initially determine the burden of persuasion, the burden of proof thereafter is precluded from shifting as a result of a presumption. Certainly shifting the burden of persuasion to the opponent after the proponent gains title to a presumption is not unprecedented. Moreover,

had . . . [Thayer] traced for himself and for us the historical development of peremptory rulings he might have been led away from the inexpedient conclusion that the burden of proof could never be shifted by a presumption, which represented a break with existing authorities and which certainly was not logically necessary. Had he not been so dogmatic he might have recognized that presumptions could be given other effects than his *prima facie* effect, thus allowing courts more elasticity in the use of the presumption device.⁵⁰

⁴⁸ O'Dea v. Amodeo, 118 Conn. 58, 66, 170 Atl. 486, 488 (1934).

⁴⁹ Maguire, *op. cit. supra* note 8, at 187. See Bohlen, "The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof," 68 U. Pa. L. Rev. 307 (1920).

⁵⁰ Reaugh, "Presumptions and the Burden of Proof," 36 Ill. L. Rev. 703, 712 (pt.1 1942). The same commentator further points out that "prior to Thayer both the Civil law . . . and Common law . . . authorities all assumed that presumptions of law did shift the burden of proof." *Id.* at 712 n.61.

Contrary to Thayer, there are many decisions today holding that certain presumptions have the effect of shifting the burden of proof. The obvious case is the presumption of legitimacy resulting from proof of birth in wedlock, which all authorities agree shifts the burden of proof to the opponent. The ancient rule to that effect is well sustained in modern times, although the degree of proof varies from one jurisdiction to another.⁵¹

At the beginning of a criminal trial there is a presumption of sanity of the accused which operates in favor of the prosecutor. If the prosecution were not required to prove capacity to form an intent, there would be no need for this presumption. If the accused denies capacity to form an intent—pleads not guilty by reason of insanity—the law in most jurisdictions has shifted the burden of persuasion to the accused, who must persuade the jury he was insane at the time of the offense.⁵² That some courts designate insanity an affirmative defense detracts not one whit from the notion that as a result of the presumption the burden thereafter was with the opponent.

In the bailor-bailee cases where the bailor proves delivery of the property to the bailee in good condition and there is either no redelivery or a failure to redeliver in good condition, a presumption of want of due care or negligence on the part of the bailee arises. The "bailee may ordinarily rebut the presumption of negligence or lack of due care by proof of loss arising from theft or fire."⁵³ Contrary to the views of those who maintain that the burden of persuasion never shifts, there are at least ten states which "hold that where the bailor proves delivery of the property to the bailee in good condition and the failure to redeliver upon legal demand, the burden of proof shifts to the bailee to prove that he exercised due care to prevent loss of the property. This is the rule adopted in Michigan, Minnesota, Kentucky, Louisiana, Nevada, New Jersey, Montana, Illinois, New York and Nebraska."⁵⁴

Likewise, in a suit to set aside a will on the grounds of undue influence, the contestant initially has the burden of introducing evidence and the burden of persuading the jury on the issue of undue influence. However, once he has established that the relationship between testator and the legatee who displaced the natural

⁵¹ Even the Model Code of Evidence, though ostensibly representing the Thayer view, has recognized that the presumption of legitimacy shifts the burden of proof. It treats this presumption as an exception to the general rule. See Model Code of Evidence rule 703, *supra* note 43.

⁵² See text at note 36 *supra*. See also *Casey v. United States*, 276 U.S. 413 (1928), and *infra* at 208-10.

⁵³ *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 286, 58 N.E.2d 658, 664 (1944).

⁵⁴ *Ibid.*

objects of a testator's bounty in the will was of a fiduciary nature, some courts have held that the use of undue influence is presumed and the burden of proof shifted to the proponent of the will who has the burden of proving there was no undue influence.⁵⁵

Finally, in Connecticut, a statute provided that "proof that the operator of a motor vehicle was the husband, wife, father, mother, son or daughter of the owner, shall raise a presumption that such motor vehicle was being operated as a family-car within the scope of a general authority from the owner, and shall impose upon the defendant the burden of rebutting such presumption."⁵⁶ A Connecticut reviewing court reversed a trial court which had set aside a verdict for the plaintiff in a suit against the son who operated the car and the father who owned it.⁵⁷ The plaintiff merely established the basic fact that the son drove the car belonging to the father, which raised a presumption of consent under the statute. The trial court "considered that the evidence of these witnesses [father and son] was such that the jury could not disregard it and were obliged as matter of law to find in accordance with it."⁵⁸ The reviewing court, however, held that the presumption survived the testimony of the witnesses until the jury "finds proven the circumstances of the situation with reference to the use made of the car and the authority of the person operating it to drive it,"⁵⁹ leaving the burden of persuasion on the issue of authority with the plaintiff.

The wealth of precedent sketched above notwithstanding, the American Law Institute in 1941 adopted the Thayer rule, set forth in rule 704.⁶⁰ However, still dissatisfied, Morgan argued:

What I object to in the Thayerian rule is this: the creation of a presumption for a reason that the court deems sufficient, a rule of law if this basic fact stands by itself there must be a finding of a presumed fact, whether the jury would ordinarily find it from the basic fact or not; but then the total destruction of the presumption just the minute some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved. It seems to me it is futile to create a presumption if it is to be so easily destroyed. And the case where the evidence would ordinarily take the case to the jury anyhow, the basic fact would ordinarily justify a finding of the presumed fact, is the case where a presumption is not so much needed. There I will agree, I should not make a very strong argu-

⁵⁵ See *Page v. Phelps*, *supra* note 46; *Soureal v. Wisner*, *supra* note 46.

⁵⁶ Conn. Gen. Stat. § 1152 b (1933).

⁵⁷ *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934).

⁵⁸ *Id.* at 66, 170 Atl. at 489.

⁵⁹ *Id.* at 66, 170 Atl. at 488.

⁶⁰ See note 43 *supra*.

ment against the Thayerian rule because it is going to be in the hands of the jury anyhow. But I think that you ought to give greater effect to a presumption than the mere burden of putting in evidence which may be disbelieved by the trier of fact.⁶¹

The Thayer rule has been followed by many courts (in some instances with an absence of clarity),⁶² but the spectre which produced Morgan's justifiable fears has been somewhat allayed as a result of legislation and decisions which have adopted rule 704 with a qualification, *i.e.*, that the rebuttal testimony must be credible, thus eliminating the possibility of a directed verdict upon the introduction of suspect testimony from interested witnesses or of unbelievable rebuttal evidence.⁶³

THE EFFECT OF PRESUMPTIONS ON BURDEN OF PROOF UNDER OHIO LAW

For many years Ohio treated the effect of presumptions on the burden of proof in a manner that gave full recognition to the legal forces responsible for their creation. That is, Ohio refused to terminate a presumption upon the mere introduction of testimony which would justify a finding that the presumed fact did not

⁶¹ Quoted in Helman, "Presumptions," 22 Can. B. Rev. 118, 134 (1944). Discussions appear in *Foreword to Model Code of Evidence* at 57 (1942).

⁶² See *Jefferson Standard Life Ins. Co. v. Clemmer*, *supra* note 41; *Silva v. Traver*, 63 Ariz. 364, 162 P.2d 615 (1945); *Kirschbaum v. Metropolitan Life Ins. Co.*, 133 N.J.L. 5, 42 A.2d 257 (Ct. Err. & App. 1945) (error to charge that, if evidence is balanced, jury may take the presumption into consideration); *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929); *City of Montpelier v. Town of Calais*, 114 Vt. 5, 39 A.2d 350 (1944) (contrary evidence which tends to show that the real fact is not as presumed makes the presumption go for naught). The rule is now followed by the United States Supreme Court. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938).

⁶³ See *e.g.*, *Speck v. Sarver*, *supra* note 11, *Ayers v. Woodard*, *supra* note 11, *Wyckoff v. Mutual Life Ins. Co.*, *supra* note 11, *Provident Life & Acc. Ins. Co. v. Prieto*, *supra* note 11, *Bradley v. Savidge*, 13 Wash. 2d 28, 123 P.2d 780 (1942).

In Ohio, Chief Justice Taft wisely recognized the danger implicit in an unqualified acceptance of Thayer when he observed in a concurring opinion that:

There may be instances where the only evidence produced or introduced to rebut the presumption against suicide is evidence which the jury may quite properly disbelieve in exercising its function as trier of the facts and judge of the credibility of witnesses. In such an instance, if the rule is as broadly stated as is suggested in paragraph two of the syllabus of *Hassay v. Metropolitan Life Ins. Co.*, 140 Ohio St., 266, 43 N.E. (2d), 299, or in paragraph three of the syllabus of *Hyrbar v. Metropolitan Life Ins. Co.*, 140 Ohio St., 437, 45 N.E. (2d), 114, then incredible evidence or evidence having no weight whatever could be effective in making the presumption against suicide disappear. Obviously, that would be unreasonable.

Carson v. Metropolitan Life Ins. Co., 165 Ohio St. 238, 244-45, 135 N.E.2d 259, 263 (1956) (concurring opinion).

exist. Except in rare cases, the presumption went to the jury under proper instructions. This was a compromise between the two extreme views outlined above.

Shifting the Burden of Proof

As early as 1906, in *Klunk v. Hocking Valley Ry.*,⁶⁴ the court announced, "to rebut and destroy a mere *prima facie* case, the party upon whom rests the burden of repelling its effect, need only produce such amount or degree of proof as will countervail the presumption arising therefrom."⁶⁵ In other cases, the Ohio court has gone so far as to say that certain presumptions continue until removed by evidence which meets or overcomes the presumption.⁶⁶

In *Hall v. Hall*,⁶⁷ the lower court was reversed because the charge to the jury was misleading

in that it no where distinctly states nor sufficiently emphasizes that the order of probate of the will, by the probate court, raises a presumption that the will so probated is the valid last will and testament of [testator] . . . that before they [the jury] would be entitled to return a verdict setting aside the will they must be able to find that the evidence adduced by the contestant . . . outweighs both the evidence adduced by the defendant . . . and the presumption arising from the order of the probate court admitting the will to probate as the valid last will and testament of [testator]. . . .⁶⁸

Likewise, Ohio has consistently maintained that the burden of proof in its second sense, the burden of persuasion, never shifts,⁶⁹ and that, consequently, a presumption cannot cause the burden of proof to shift. Nevertheless, there are several obvious instances under Ohio law where the burden of persuasion does shift as a result of a presumption's entering the case, despite the judicial pronouncements to the contrary. For example, there has never been any question under Ohio law that, where the basic facts establish a presumption of legitimacy, the burden of proof is shifted to the opponent of the presumption, who challenges the legitimacy of the child.⁷⁰

⁶⁴ 74 Ohio St. 125, 77 N.E. 752 (1906).

⁶⁵ *Id.* at 133, 77 N.E. at 754.

⁶⁶ See, e.g., *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928) (evidence sufficient to counter balance); *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928) (meet, extinguish, rebut, countervail or overcome).

⁶⁷ 78 Ohio St. 415, 85 N.E. 1125 (1908).

⁶⁸ *Id.* at 416, 85 N.E. at 1125. (Emphasis added.)

⁶⁹ *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 42 N.E.2d 504 (1949); *Smith v. Lopa*, 123 Ohio St. 213, 174 N.E. 735 (1931); *Tresise v. Ashdown*, *supra* note 66; *White Oak Coal Co. v. Rivoux*, 88 Ohio St. 18, 102 N.E. 302 (1913); *Ginn v. Dolan*, 81 Ohio St. 121, 90 N.E. 141 (1909). See also Ohio Jur. 2d *Evidence* §§ 155, 157 (1956).

⁷⁰ State *ex rel.* *Walker v. Clark*, 144 Ohio St. 305, 58 N.E.2d 773 (1944).

Another example, explicit in *Hall*, is the presumption of the validity of a will and the testator's competency once the will has been admitted to probate. Here, Ohio has held that by virtue of that presumption the contestant of the will cannot win unless the evidence offered by him preponderates when compared with the weight of the evidence of the proponent in favor of validity, to which must be added the weight of the presumption of validity.⁷¹ Commentators might be at a loss to explain how a jury can weigh a presumption; however, cases like *Hall* exhibit the length to which some courts will go to insure that a presumption survives rebuttal evidence.

Again, where a statute creates a presumption of transfer in contemplation of death where the transfer was made within two years of death, "unless the contrary is shown,"⁷² the statute has been construed to hold that the transferee "has the burden of overcoming the presumption against him by a preponderance of the evidence."⁷³

The cases above are examples where the presumption has patently shifted the burden of proof to the opponent of the presumption. Moreover, there are other cases in Ohio where a presumption, in essence, does the same thing—that is, causes the burden of proof to shift—but, refusing to abandon the concept that the burden of proof never shifts, the courts have indulged in semantic exercises to avoid deviation from their established position.

With regard to the presumption of negligence against the bailor, Ohio, adopting Thayer's view, has consistently held that

"the burden of proof in such a case [bailment] does not shift with the evidence, but remains with the bailor, who must prove his case by a preponderance of all the evidence."

At least that is the rule more nearly consistent with previous pronouncements of this court upon the subject of burden of proof.⁷⁴

"Where, however, the bailee proves loss of the bailed article by theft but attempts no explanation of the circumstances and offers no proof of facts from which an inference of due care may be drawn, he does not rebut the presumption of negligence arising from his failure to return the bailed property."⁷⁵

Again, the Ohio Supreme Court, steadfastly clinging to its position that the burden of proof does not shift, in a case involving a

⁷¹ *Hall v. Hall*, *supra* note 67.

⁷² Ohio Rev. Code Ann. § 5731.04 (Page 1953).

⁷³ *In re Estate of Walker*, 161 Ohio St. 564, 570, 120 N.E.2d 432, 435 (1954).

⁷⁴ *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 288, 58 N.E.2d 658, 664 (1944).

⁷⁵ *Id.* at 286, 58 N.E.2d at 664.

suit to set aside an antenuptial agreement on the grounds that it was unfair, unreasonable, and fraudulent held that:

if the provision for the prospective wife is, in the light of surrounding circumstances, wholly disproportionate to the means of her future husband and to what she would receive under the law, the burden rests on those claiming the validity of the contract to show that there was a full disclosure of the nature, extent and value of the intended husband's property, or that she had full knowledge thereof without such disclosure, and that she, with this knowledge, voluntarily entered into the antenuptial settlement. . . . the burden of proof does not shift in Ohio . . . [however] disclosure as a justification or excuse for the disproportionateness is an affirmative defense.⁷⁶

Here the widow starts out with the burden of producing evidence and the burden of persuading the jury that the antenuptial agreement is unfair, unreasonable, and fraudulent. Once she establishes the basic fact that the provisions in the agreement for her are wholly disproportionate, she has presumptively proved that the contract is unfair and unreasonable. The fact of unfairness is thereafter assumed until and unless the defendant shows that there was "full disclosure of the nature, extent and value of the intended husband's property, or that she had full knowledge thereof without such disclosure, and that she, with this knowledge, voluntarily entered into the antenuptial settlement."⁷⁷ The presumed fact of unfairness, in the absence of proof of disclosure, knowledge, and voluntary acceptance, is mandatory on the trier of fact. Here, the proponent of the contract, the opponent of the presumption, is encumbered with the double burden of coming forward with and of proving facts that, in essence, constitute fairness. In effect, the presumption of unfairness from the basic fact of disproportion has shifted the burden of proving fairness to the opponent, and a new affirmative defense has been created in preference to acknowledging that the burden of persuasion on the issue of fairness has shifted. "A burden phrased in terms of explaining or exculpating is difficult to distinguish from a burden of persuading."⁷⁸

⁷⁶ *Juhasz v. Juhasz*, 134 Ohio St. 257, 264, 16 N.E.2d 328, 331 (1938).

⁷⁷ *Ibid.*

⁷⁸ McCormick, Evidence 644 n.24 (1954).

The same might be said with regard to the presumption of sanity in a criminal case. Ohio courts open with the presumption at the outset of trial that the accused is sane, even though the state must prove every element of the offense, including intent to commit it, which cannot exist if the accused is insane. Nevertheless, Ohio begins with the presumption of sanity in favor of the state and then concludes that the accused must prove insanity by a preponderance of the evidence. Despite the fact that this is called an affirmative defense, it is in essence a disguise for shifting the burden of proof.

Effect of Rebuttal

The unequivocal judicial pronouncements noted above on the quantum of rebuttal required to liquidate a presumption were seemingly ignored in *Baily v. Weaver*.⁷⁹ In that case, the plaintiff sought to reach a car-owner's insurer after recovering a judgment against the driver. In the action against the driver and the owner's insurer, the central issue was whether the driver had the owner's consent. Plaintiff was aided by a presumption which was sufficient to make a *prima facie* case. This would have precluded a directed verdict against her, however, she chose to call the owner as her own witness to prove consent. The owner testified that the driver had no consent to drive the car at the time of the accident. Plaintiff also called the driver, a nephew of the owner, for cross-examination: he too denied consent, but his denial was impeached by showing a prior inconsistent statement.

The jury could have disbelieved either or both of these interested witnesses⁸⁰ had the issue been submitted to them, however, the court decided that the presumption remained only while there was "no substantial evidence to the contrary. When such evidence is offered, the presumption disappears, and in the absence of further proof there is nothing to justify a finding in accordance with the presumption."⁸¹ The court directed a verdict for the defendant, holding that the owner's testimony constituted substantial rebuttal evidence, came from the plaintiff's own witness, and, accordingly, barred the issue of consent from the jury. The court recognized that ordinarily the credibility of witnesses is a matter for the jury, but felt that considerations related to the impermissibility of impeaching one's own witness took this case out of the province of the jury.⁸²

Why should evidence from interested witnesses, conceivably unworthy of belief, be regarded as sufficient evidence to overcome a presumption rooted in public policy? "Insufficient evidence is, in

⁷⁹ 67 Ohio App. 259, 35 N.E.2d 1006 (1941).

⁸⁰ Compare *Pariso v. Towse*, 45 F.2d 962 (2d Cir. 1930); *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934); *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929).

⁸¹ *Baily v. Weaver*, *supra* note 79, at 270, 35 N.E.2d at 1011.

⁸² The deeply-rooted doctrine of vouching for the credibility of one's own witness is surely too broadly applied in *Baily*.

Analytical justification of the restrictions is on the whole a contemptible failure. Reasoning that a party may pick and choose his own witnesses and should therefore be bound by utterances of those whom he elects to use is so plainly untrue in most unpremeditated litigation that it would not be offered except by way of strained effort to sustain a convention.

Morgan & Maguire, *Cases on Evidence* 245 n.3 (3d ed. 1951); see Ladd, "Impeachment of One's Own Witness—New Developments," 4 U. Chi. L. Rev. 69 (1936).

the eyes of the law, no evidence.”⁸³ As Judge Taft observed in his concurring opinion in *Carson v. Metropolitan Life Ins. Co.*, unbelievable evidence should have no effect on a presumption, despite Thayer’s position that when *any* evidence is introduced the presumption vanishes.⁸⁴

In *Baily*,⁸⁵ the jury might have agreed with the court, but it was never given a chance. This was a perfect situation for letting the presumption go to the jury, for the trial lawyer and litigant are unconcerned with whether you call a presumption “evidence” or treat it as evidence for the sake of getting by a directed verdict, so long as the litigant has his day in court. As one court aptly expressed it, “no matter what the philosophical reasoning may be, the result is the same in that a jury question is presented.”⁸⁶ There are decisions recognizing that witnesses interested in the outcome of the case are prone to be partial, and that presumptions are in the nature of evidence.⁸⁷ Accordingly, the presumptions should remain in the case though contrary evidence has been offered.

The reasoning of the court in *Baily* indicates that the result might not have been the same had the owner and driver offered their testimony in behalf of the insurer, but that, in that event, the court might have been persuaded by cases holding that a presumption will not lose its applicability by the *direct* testimony of interested witnesses.⁸⁸ Sound reasoning, it appears, should refuse to regard a presumption as ephemeral, especially where rebuttal evidence comes from interested witnesses, regardless of sponsorship.

In situations where the driver and owner are defendant’s witnesses and not plaintiff’s, trial courts let cases go to the jury on the presumption of consent. For example, this conclusion was reached in *Cebulak v. Lewis*,⁸⁹ which held that a statutory presumption of consent did not disappear when competent evidence to rebut the presumption had been adduced. It would seem that the conclusion should be the same regardless of whether the presumption of consent is statutory or otherwise.

⁸³ *Matter of Case*, 214 N.Y. 199, 203, 108 N.E. 408, 409 (1915).

⁸⁴ *Carson v. Metropolitan Life Ins. Co.*, 165 Ohio St. 238, 135 N.E.2d 259 (1956) (concurring opinion).

⁸⁵ *Baily v. Weaver*, *supra* note 79.

⁸⁶ *Egger v. Northwestern Life Ins. Co.*, 203 Wis. 329, 336, 234 N.W. 328, 330, (1931).

⁸⁷ *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931); *Chaika v. Vanderberg*, 252 N.Y. 101, 169 N.E. 103 (1929); *Ferris v. Sterling*, 214 N.Y. 249, 108 N.E. 406 (1915); *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P.2d 227 (1944). See also text at notes 10-15 *supra*; Annot., 95 A.L.R. 878, 883-85 (1935); McBaine, “Presumptions, Are They Evidence?” 26 Calif. L. Rev. 519, 550 (1938).

⁸⁸ See *Reinhart v. Oregon-Wash. R. & N. Co.*, 174 Wash. 320, 24 P.2d 615 (1933).

⁸⁹ 320 Mich. 710, 32 N.W.2d 21, 5 A.L.R.2d 186 (1948).

Judge Hand, in *Pariso v. Towse*,⁹⁰ a case similar to *Baily*, left the credibility of the witnesses to the jury, holding that the court could not direct a verdict. The case dealt with a New York statute imposing liability on the owner of a truck if the driver had the consent of the owner. There was, of course, a presumption that the owner had consented to the truck's use. The court said,

The mere fact of his possession of the truck did not support an inference of consent. . . . It appears from the foregoing that, by the New York law, either the presumption must be treated as evidentiary at all stages of the case, or else that upon this issue a denial may be taken as positive evidence of consent. In ordinary cases it is indeed settled law for us that a jury need not accept a party's uncontradicted evidence. . . .⁹¹

Thus the presumption went to the jury and competed with the interested witness' denials and the force of the presumption was not broken by evidence that the jury might refuse to believe—a decision which appeals to common sense.

In 1957, the case of *Ayers v. Woodard*⁹² marked a milestone and a departure for Ohio on the subject of presumptions. In that case the plaintiff sued a sheriff to recover damages alleged to have been caused by an assault and battery on plaintiff by McCarty, a deputy sheriff. One of the issues was "whether the deputy sheriff was acting within the scope of his capacity as an officer of the law at the time of the incident." The trial court charged the jury that "his [McCarty's] acts will be presumed to have been performed in his capacity as such deputy sheriff, and anyone who claims that Jerome McCarty was not acting as a deputy sheriff must show affirmatively that such was the case, by overcoming such presumption by a preponderance of the evidence."⁹³ The Supreme Court in *Ayers* correctly decided that "the charge of the trial court regarding the presumption . . . placed too great a burden upon the defendants. . . ." ⁹⁴ Speaking through Judge Matthias, the court said:

A presumption is a procedural device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate; and where a litigant introduces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such

⁹⁰ *Supra* note 80.

⁹¹ *Pariso v. Towse*, *supra* note 80, at 965.

⁹² *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E.2d 401 (1957).

⁹³ *Id.* at 141, 140 N.E.2d at 404.

⁹⁴ *Id.* at 145-46, 140 N.E.2d at 406.

evidence, the presumption never arises and the case must be submitted to the jury without any reference to the presumption in either a special instruction or a general charge.⁹⁵

Referring to cases wherein it was held reversible error to charge the jury on the presumption where the party having the benefit of the presumption offered direct evidence on the presumed fact, the court, in its opinion, stated:

The rationale of the decisions is that a presumption is dispositive solely where *neither* party introduces substantial credible evidence regarding the fact to be presumed. Conversely, when either party introduces substantial credible evidence tending to prove a fact which would otherwise be presumed, the presumption either never arises or it disappears. If, for example, the presumption operates in favor of the plaintiff and against the defendant, then it never arises if the *plaintiff* introduces *evidence tending to prove it, i.e.*, plaintiff has no need for the aid of the presumption, or, if the plaintiff has sought the aid of the presumption by nonproduction of evidence and the defendant introduces evidence of a substantial nature which at least counterbalances the presumption, then it disappears.⁹⁶

There appeared no judicial necessity for the announcement of a new rule in Ohio with regard to the procedural effect of a presumption and the ancillary question of the propriety of mentioning the word "presumption" to the jury. These could easily have been avoided and for that reason might be considered obiter.

With one simple declaration the court could have disposed of the entire case by declaring that the charge was reversible error, citing *Klunk v. Hocking Valley Ry.*,⁹⁷ *Tresise v. Ashdown*⁹⁸ and several other decisions as the law of Ohio for more than fifty years. These cases held, in accordance with the well established general rule,

that to rebut and destroy a mere *prima facie* case, the party upon whom rests the burden of repelling its effect, need only produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose, *counterbalance* the evidence by which the *prima facie* case is made out or established, it need not *overbalance* or outweigh it.⁹⁹

⁹⁵ *Id.* at 138-39, 140 N.E.2d at 401 (syllabus).

⁹⁶ *Id.* at 144-45, 140 N.E.2d at 406.

⁹⁷ *Klunk v. Hocking Valley Ry.*, *supra* note 64.

⁹⁸ *Tresise v. Ashdown*, *supra* note 66.

⁹⁹ *Klunk v. Hocking Valley Ry.*, *supra* note 64, at 133, 77 N.E. at 754.

Not content to decide the case on clearly established law and there end the matter, the court went on to add, that "presumptions are indulged in only to supply facts" and are "dispositive solely where *neither* party introduces substantial evidence regarding the fact to be presumed. Conversely when either party introduces substantial credible evidence tending to prove a fact which would otherwise be presumed, the presumption either never arises or it disappears."¹⁰⁰ The court then added that the facts of the case were susceptible of an inference that the deputy was acting within his authority, and that such inference constituted substantial credible evidence. Since the issue of authority could get to the jury without the presumption, the presumption never entered the case: if it did, it perished when the potential inference made its appearance.

The view expressed in *Ayers* sounds like rule 704(2) in the Model Code of Evidence¹⁰¹ with the important qualification that Ohio now requires from the opponent of the presumption "substantial credible evidence" contrary to the presumed fact to eliminate the presumption from the case. In one respect it is a significant improvement on *Baily* and on *Thayer*, for it requires the testimony of the opponent of the presumption to be worthy of belief and substantial before the presumption is driven from the case. However, the rule as thus announced is not free of problems; in fact, new ones have entered the scene.

What quantity and quality is "substantial?" The court did not define it and what it means is not clear. One court defined substantial evidence as evidence "near enough to the issue to be logically significant."¹⁰² In that case a denial by the owner of an automobile that the driver had consent to operate the automobile was not considered substantial, that is, it was not sufficient to destroy the presumption of control. If the jury rejected the denial, the presumption remained.¹⁰³ On the other hand, the Supreme Court has stated "that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence."¹⁰⁴ There are suggestions that the evidence is substantial even if it comes from interested witnesses, "provided that their testimony is uncontradicted, unimpeached, clear and convincing."¹⁰⁵

¹⁰⁰ *Ayers v. Woodard*, *supra* note 92, at 144, 140 N.E. at 406.

¹⁰¹ See note 43 *supra*.

¹⁰² *Pariso v. Towse*, *supra* note 80, at 964. The same court later indicated it would have to be evidence to support a finding. *Alpine Forwarding Co. v. Pennsylvania R.R.*, 60 F.2d 734 (2d Cir. 1932).

¹⁰³ *Pariso v. Towse*, *supra* note 80. See also *Chaika v. Vanderberg*, *supra* note 87.

¹⁰⁴ *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

¹⁰⁵ *Bradley v. S. L. Savidge, Inc.*, 13 Wash. 2d 28, 63, 123 P.2d 780, 795 (1942).

Shortly before *Ayers*, the court, in talking of an inference (which lacks the mandatory quality of a presumption and the stamp of some policy or need as its genesis) stated:

It is true that any inference or deduction may be, in a given case, totally destroyed by evidence to the contrary. But for this court to say, as a matter of law, that an inference is overcome by direct testimony to the contrary, such direct testimony must be such that reasonable minds could not reach different conclusions as to its preponderating value when measured against the weight of the circumstantial evidence.¹⁰⁶

Certainly a presumption created for cogent reasons ought to be considered to have more surviving power than an inference in the face of contrary evidence.

An additional problem results from the undefined word "credible." A Wisconsin court summarily dismissed the question by stating:

While the language relating to the quantum of evidence varies somewhat, the terms used as "credible evidence," "some evidence," and "evidence" are practically, as used, synonymous. . . . The real question is, in a particular case, is there or is there not evidence of the fact found?¹⁰⁷

In *Ayers*, though the presumption went out of the case, the issue went to the jury on the possible inference. Suppose, however, there is no potential inference in the case, but the evidence contrary to the presumption comes from interested witnesses or parties. Who is to judge the credibility of the evidence contrary to the presumption? *Ayers* indicates that the court makes that decision. The same court in *Hrybar v. Metropolitan Life Ins. Co.*,¹⁰⁸ held that the weight of the opponent's rebuttal evidence was a jury question. As indicated, in New York, Connecticut, and Michigan, the presumption of consent in the automobile cases remained if the jury rejected the owner's denial of any consent to the driver's use of the car. One court stated "as experience has justified the ends for which they [presumptions] were called into being, they should not be discarded, because forsooth in some of their aspects, they may not fit into the framework of logical analysis."¹⁰⁹ Other courts have held that, ex-

¹⁰⁶ *Hurt v. Charles J. Rogers Trans. Co.*, 164 Ohio St. 329, 334, 130 N.E.2d 820, 824 (1955).

¹⁰⁷ *Hills Dry Goods Co. v. Industrial Comm'n.*, 217 Wis. 76, 83, 258 N.W. 336, 339 (1935).

¹⁰⁸ 140 Ohio St. 437, 45 N.E.2d 114 (1942).

¹⁰⁹ *Provident Life & Acc. Ins. Co. v. Prieto*, 169 Tenn. 124, 167, 83 S.W. 251, 267 (1935).

cept where the contrary evidence warrants a directed verdict as to presumed fact, the liquidation of the presumption in the face of rebuttal evidence is to be the province of the jury.¹¹⁰

Where does *Ayers* leave *Tresise*, *Hall*, *Klunk*, *Carson*, and a host of other Ohio cases which consistently left the presumption in the case until it was overcome by adequate rebuttal evidence to the satisfaction of the jury? The writer's opinion is that the court in *Ayers* did not consider carefully enough, at least with respect to some presumptions, the usual province of the jury with regard to the credibility of witnesses who offer rebuttal testimony. For example, what will the court say of the presumption of legitimacy, universally recognized as shifting the burden of persuasion to the party who challenges the legitimacy of a child born in wedlock?¹¹¹ Will this presumption disappear upon the introduction of substantial credible evidence to the contrary? Also, will not the court have to acknowledge that the statutory presumption of the validity of a will upon probate is evidence, shifts the burden of proof to the opponent of the presumption, and does not perish upon the introduction of "substantial credible evidence?"¹¹²

Despite judicial pronouncements that the presumption of innocence merely cast upon the prosecution the burden of proving the accused guilty beyond a reasonable doubt,¹¹³ Ohio statutory law requires the trial court, in its charge to the jury to "state the meaning of presumption of innocence, and read . . . [the] definition of reasonable doubt."¹¹⁴ Moreover, the statutes create a presumption of transfer in contemplation of death if made within two years of death and shift the burden of persuasion to the transferee to show, by a preponderance of the evidence,¹¹⁵ that the transfer was not made in contemplation of death.¹¹⁶ At least *Ayers* cannot override these specific statutory provisions.

With regard to the presumption of sanity, what is the court going to say, in view of *Ayers*, where the accused has introduced substantial credible evidence of insanity? Is the accused still shackled with the burden of proving insanity by a preponderance of the evidence? Or, by virtue of the dissipation of the presumption, has the burden returned to the state to prove beyond a reasonable

¹¹⁰ *Gillett v. Michigan United Traction Co.*, 205 Mich. 410, 171 N.W. 536 (1919); *Ryan v. Metropolitan Life Ins. Co.*, 206 Minn. 562, 289 N.W. 557 (1939).

¹¹¹ *State ex rel. Walker v. Clark*, 144 Ohio St. 305, 58 N.E.2d 773 (1944).

¹¹² See *Kennedy v. Walcutt*, 118 Ohio St. 307, 160 N.E. 898 (1928).

¹¹³ *Morehead v. State*, 34 Ohio St. 212 (1877).

¹¹⁴ Ohio Rev. Code Ann. § 2945.04 (Page 1953).

¹¹⁵ *In re Estate of Walker*, *supra* note 73.

¹¹⁶ Ohio Rev. Code Ann. § 5731.04 (Page 1953).

doubt the sanity of the accused, as well as the other elements of the offense? ¹¹⁷

When the wife commits a crime in the presence of her husband does the presumption of coercion automatically leave the scene when there is evidence rebutting it; or is the policy that gave birth to the presumption so strong that such an easy demise would be considered unjustifiable homicide? ¹¹⁸

It is both interesting and speculative as to whether the court hereafter will apply the ruling of *Ayers* to a case involving a letter properly addressed to the addressee and properly stamped with sufficient postage and deposited in a mail box, which basic facts give rise to the presumption that it was duly received. One Ohio court held, prior to *Ayers*,

this presumption "does not stand merely until evidence comes in to cause it to then disappear. It continues as evidence, to be considered in the light of all the facts and circumstances adduced on the trial and to be given such weight as the triers think it entitled to in determining the fact at issue, whether, the mailed letter was received."¹¹⁹

¹¹⁷ Upon analysis, it is axiomatic that an accused, if insane at the time the offense was committed, cannot be convicted of the crime—he must be acquitted. Because most men are sane, the law presumes that the accused was sane at the time of the offense. Obviously, if it were not necessary in the first place for the state to prove the accused sane, there would be no necessity to indulge in the presumption. Ohio, too, operates under this presumption. In addition, it holds, as has been previously pointed out, that if the accused contends that he was insane at the time of the offense, the burden is on him to prove insanity by a preponderance of the evidence. Paradoxically, Ohio still maintains that the state nevertheless is obligated to prove every element of the offense beyond a reasonable doubt. It follows that, except for the presumption, the state logically would have to prove the accused was sane. Now, under *Ayers v. Woodard*, suppose substantial credible evidence of insanity was introduced by the accused, the opponent of the presumption of sanity. Under *Ayers* the presumption of sanity would then go out the window, and the state would be back to proving beyond a reasonable doubt that every element of the offense was committed by an accused who was sane at the time. Can you imagine the dilemma that confronts the trial judge when such substantial credible evidence has been introduced by the accused on the issue of sanity? The state no longer can rely upon the presumption if *Ayers* is applicable. *Quaere*: Does that mean that the accused has been relieved of the burden of proving insanity by a preponderance of the evidence? One can see the perplexing problems confronting the trial judge—and the jury—in determining the effect of substantial credible evidence on the presumption, the burden of proof, and the proper instructions to the jury. In *State v. Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964), the court once more stated the presumption. There was no reference to the effect of substantial credible evidence on the life of the presumption.

¹¹⁸ See *Tabler v. State*, 34 Ohio St. 127 (1877).

¹¹⁹ *Stevens-Davis Co. v. Parkway Oils, Inc.*, 27 Ohio L. Abs. 126, 127 (Ct. App. 1937). The court's quotation is from *Atlantic Dredging & Const. Co. v. Nashville Bridge Co.*, 57 F.2d 519 (5th Cir. 1932).

Another held that this presumption of delivery "is a rebuttable presumption and may be met by evidence of equal weight to overcome the presumption of delivery."¹²⁰ Of course, the court could distinguish those cases by declaring that the basic facts create an inference of delivery, with no need for a presumption, making the presumed fact of receipt issuable and determinable by a jury, despite substantial credible rebutting evidence. A Massachusetts court adopted a similar view.¹²¹ Justice Lummus explained that

the mailing of a letter properly addressed and postpaid . . . does not merely create a presumption . . . but rather constitutes *prima facie* evidence . . . of delivery to the addressee in the ordinary course of mail. . . . [A]s soon as evidence is introduced that warrants a finding that the letter failed to reach its destination, the artificial compelling force of the *prima facie* evidence disappears, and the evidence of non-delivery has to be weighed against the likelihood that the mail service was efficient in the particular instance, with no artificial weight on either side of the balance.¹²²

RES IPSA LOQUITUR

The doctrine of *res ipsa loquitur* has been held "applicable where (a) the instrumentality causing the injury was under the exclusive management and control of the defendant and (b) where the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed."¹²³

There are a few early decisions that refer to *res ipsa loquitur* as a presumption of negligence which shifts the burden of proof.¹²⁴ In Pennsylvania at one time it was held that "a presumption of negligence arose and thereupon the burden was shifted to the defendant requiring of it to show use of . . . care and diligence. . . ." ¹²⁵ One authority contends that *res ipsa loquitur* should assume the stature of a presumption in carrier and bailment cases, making it mandatory on the jury, if unrebutted, and even "placing on [the

¹²⁰ *Griffin v. General Assur. Co.*, 94 Ohio App. 403, 410, 116 N.E.2d 41, 46 (1953).

¹²¹ *Hobart-Farrell Plumbing & Heating Co. v. Klayman*, 302 Mass. 508, 19 N.E.2d 805 (1939).

¹²² *Id.* at 509-10, 19 N.E.2d at 807.

¹²³ *Stoltz v. Colony Recreation Center*, 151 Ohio St. 503, 87 N.E.2d 167, 168 (1949).

¹²⁴ *Cleve. C.C. & St. L. Ry. v. Hadley*, 170 Ind. 204, 84 N.E. 13 (1907); *Schecter v. Hann*, 305 Ky. 794, 205 S.W.2d 690 (1947); *Kearner v. Tanner Co.*, 31 R.I. 203, 76 Atl. 833 (1910). See also *Annot.*, 167 A.L.R. 658, 663 (1947).

¹²⁵ *Doud v. Hines*, 269 Pa. 182, 185, 112 Atl. 528, 529 (1921); see *Moglia v. Nassau Elec. Ry.*, 111 N.Y.S. 70, 127 App. Div. 243 (1908).

defendant] the burden of proof requiring him to exonerate himself by a preponderance of the evidence or make good the loss.”¹²⁶ However, the maxim, in most states, despite being designated a presumption, has actually been treated as an inference.¹²⁷

Ohio regards *res ipsa loquitur* as “a rule of evidence which permits, but does not require, the jury to draw an inference of negligence. . . .”¹²⁸ Since “an inference is a deduction . . . a jury may attach probative value, or evidentiary weight, to such a deduction in the same manner and to the same extent . . . it may accept, reject or attach probative value to positive testimony or direct evidence,”¹²⁹ it is apparent that the inference would survive the test of contrary substantial credible evidence, set forth in *Ayers v. Woodard*¹³⁰ for neutralizing a presumption and causing its exit from the case.

In passing it might be mentioned that this doctrine, simple in expression, has proved difficult in application in factual situations. The doctrine was designed to help the innocent injured plaintiff who does not know what, if any, specific act or acts of negligence of the defendant caused his injury. Under the confused status of the law in Ohio, he finds himself in a Serbonian bog. He can allege facts he reasonably feels will require the application of the *res ipsa* rule. However, he is not positive that the doctrine applies, and to make sure he will get to the jury in the event the rule does not fit the facts, or because he feels specific conduct or omissions of the defendant within his knowledge constitute specific grounds of negligence, he also alleges those in his petition. The plaintiff offers his evidence and rests, content that either the doctrine or the proof of the alleged grounds of negligence will get him to the jury. Does he waive the use of the doctrine because he alleged specific negligence and attempted to prove it, but failed? The *Fink* case (obiter) says no;¹³¹ the *Winslow* case says yes.¹³² A comprehensive article¹³³ on the subject concludes by expressing the opinion that, despite *Winslow*, “by alleging specific negligence and attempting to prove it, the pleader did not waive the doctrine of *res ipsa loquitur*.”¹³⁴ However, the writer warns that “the effect of the *Winslow* decision will

¹²⁶ Prosser, Torts 235 (3d ed. 1964).

¹²⁷ McCormick, Evidence 643, 644 (1954).

¹²⁸ *Schafer v. Wells*, 171 Ohio St. 506, 172 N.E.2d 708 (1961); *Renneckar v. Canton Terminal Restaurant, Inc.* 148 Ohio St. 119, 73 N.E.2d 498 (1947).

¹²⁹ *Ayers v. Woodard*, 166 Ohio St. 138, 145, 140 N.E.2d 401, 406 (1957).

¹³⁰ *Supra* note 129.

¹³¹ *Fink v. New York Central R.R.*, 144 Ohio St. 1, 56 N.E.2d 456 (1944).

¹³² *Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947).

¹³³ Knepper, “Pleading in *Res Ipsa Loquitur* Cases,” 23 Ohio St. L.J. 450 (1962).

¹³⁴ *Id.* at 459.

continue to raise some doubts until the supreme court makes a positive statement on the subject in a case in which the question is directly presented.”¹³⁵

THE PRESUMPTION OF LEGITIMACY

From time immemorial, the presumption that a child born in wedlock is legitimate has been regarded as “one of the strongest and most persuasive known to the law.”¹³⁶ It finds its genesis in a deeply-rooted judicial antipathy to bastardizing a child who, under the common law, is thereafter unable to inherit, is considered *fillius nullius*, and is socially stigmatized. The law reasons that the probability is strong that such a child is legitimate, that it would be unfair to place on him the impossible burden of proving it, and that it would be good public policy to assume that children born in wedlock are not bastards. Therefore, it is held that “every child begotten in lawful wedlock is presumed in law to be legitimate.”¹³⁷

In its inception, the presumption was practically unassailable. The English courts simply held that if a husband, not physically incapable, was within the four seas of England during the period of gestation, the judge would not listen to evidence casting doubt on his paternity. “The rule of the four seas” was, in essence, an irrebuttable presumption. That inflexible “presumption” has been the object of historical development and evolution, and its unsoundness and patent unfairness in time had to yield to reason. Once “the rule of the four seas” was denounced and rejected in *Pendrell v. Pendrell*¹³⁸ the presumption was regarded as rebuttable. It then became a matter of the quantity and quality of the evidence required to shatter it. The inexorable presumption gave way to the doctrine that a finding of no access—no opportunity for sexual connection—could liquidate the presumption. He who had the burden of proving non-access had to do so by “clear and convincing evidence,” by proof “to the satisfaction of the jury,” by proof “beyond all reasonable doubt,” or by “strong, distinct, satisfactory and conclusive proof.”¹³⁹ Cardozo, in a scholarly and enlightening opinion, after tracing the origin and history of the rule, observed that, “What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common

¹³⁵ *Ibid.* Cf. *Oberlin v. Friedman*, 1 Ohio App. 2d 499 (1965) (following *Winslow*).

¹³⁶ *In re Findlay*, 253 N.Y. 1, 7, 170 N.E. 471, 472 (1930).

¹³⁷ *State ex rel. Walker v. Clark*, 144 Ohio St. 305, 309, 58 N.E.2d 773, 775 (1944).

¹³⁸ 2 Str. 925, 93 Eng. Rep. 945 (K.B. 1733).

¹³⁹ See Note, “Presumption of Legitimacy of a Child Born in Wedlock,” 33 Harv. L. Rev. 306 (1919).

sense and reason are outraged by a holding that it abides.”¹⁴⁰ In another oft-cited case the court argued that it takes evidence beyond a reasonable doubt of non-access to explode the presumption, and at the same time asserted that this requirement has nothing to do with the presumption, but results only from the fact that in a case involving the presumption of legitimacy, “the degree of proof to establish illegitimacy is fixed by a rule of substantive law . . . this rule accompanies the presumption . . . it is the rule and not the presumption that fixes the burden . . . of proof.”¹⁴¹ Of course, the foregoing analysis merely follows the Thayerian principle that the burden of proof never shifts as a result of a presumption. Thus, Thayer stated, the rule as to legitimacy results more accurately from a substantive rule of law that accompanies the particular presumption. Consistency compelled him and those who supported him to invoke the substantive-rule-of-law concept, even where the presumption was rebuttable, rather than admit that the presumption of legitimacy is an exception to this rule.

Despite Thayer, practically all other writers and decisions maintain that once the presumption of legitimacy is created, the burden of persuasion shifts to the opponent. The cases are legion to that effect,¹⁴² and the Model Code of Evidence adopted the modern rule in general form by virtue of rule 703.¹⁴³

Ohio was long committed to the rigid rule that “before such child can be adjudged a bastard the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child.”¹⁴⁴ However, in 1944, the Ohio Supreme Court announced that the former Ohio rule was “nearly as rigid as the ancient English rule of the four seas,” and decided that the law in Ohio should be that “while every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived.”¹⁴⁵ With regard to the quality of the rebuttal evidence required in Ohio, subsequent cases have stated that the presumption is overcome only by strong and convincing evidence.¹⁴⁶

¹⁴⁰ *In re Findlay*, *supra* note 136, at 8, 170 N.E. at 473.

¹⁴¹ *In re Jones Estate*, 110 Vt. 438, 448, 8 A.2d 631, 633 (1939).

¹⁴² Annot., 128 A.L.R. 713, 720 (1940).

¹⁴³ See note 43 *supra*.

¹⁴⁴ *Powell v. State ex rel. Fowler*, 84 Ohio St. 165, 95 N.E. 660 (1911).

¹⁴⁵ *State ex rel. Walker v. Clark*, *supra* note 137, at 310, 312, 58 N.E.2d at 776.

¹⁴⁶ See *McGhee v. McGhee*, 45 Ohio L. Abs. 465, 468, 64 N.E.2d 154, 156 (Ct. App. 1945). See also *State ex rel. Satterfield v. Sullivan*, 115 Ohio App. 347, 185 N.E.2d 47 (1962).

THE PRESUMPTION OF INNOCENCE

No presumption in the field of evidence has engendered more heat and less light than the presumption of innocence.

There has been little doubt among most authorities that, upon analysis, a presumption, especially if it has been rebutted, has no evidential value. Nevertheless, some courts have clung tenaciously to the notion that the presumption of innocence survives to the bitter end, regardless of any contrary evidence, and should enter the jury room. Even Wigmore, a Thayer disciple, maintained that the presumption of innocence:

is in truth merely another form of expression for part of the accepted rule for the burden of proof in criminal cases, i.e., that it is for the prosecution to adduce evidence . . . and to produce persuasion beyond a reasonable doubt. . . . However, in a criminal case, the term does convey a special and perhaps useful hint, over and above the other form of the rule about burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusion solely from the legal evidence adduced.¹⁴⁷

Another authority critically noted:

The language about this principle sometimes countenanced in instructions to the juries is an outrage to common sense. Metaphor is piled on metaphor until the presumption of innocence, if you really believe the talk, becomes a noble knight in gleaming armor battling for the right from beginning to end of a criminal trial and making it almost shameful to bring in a verdict of guilty. . . . [I]n a decently planned and operated system of prosecutions a true "presumption of innocence" has no basis in likelihood or policy. . . . Needless to say, there is no public policy favoring acquittal of the guilty.¹⁴⁸

At one time, the Supreme Court declared that the presumption of innocence "is recognized as a presumption of law and . . . is evidence in favor of the accused."¹⁴⁹ This view was articulated in the

¹⁴⁷ 9 Wigmore, Evidence § 2511 (3d ed. 1940).

¹⁴⁸ Maguire, Evidence, Common Sense & Common Law 191, 192 (1947).

¹⁴⁹ Coffin v. United States, 156 U.S. 432, 460 (1894).

United States as early as 1842 by Greenleaf in his works on evidence, where he stated that the presumption "is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled."¹⁵⁰ That concept still lingers in several jurisdictions which treat the presumption as evidence; and most jurisdictions insist that it requires the court to include the phrase in the charge to the jury.¹⁵¹

In recent years, with very few exceptions, the courts have refused to be beguiled by counsel into perpetuating the unsound and illogical notion that this ritualistic presumption is evidence. In one form or another, they now recognize that this presumption

is not, strictly speaking, a presumption in the sense of an inference deduced from a given premise. . . . Once this so-called presumption has placed upon the state the burden of proving guilt it has served its chief purpose. . . . [I]t requires evidence of guilt, but is not evidence of innocence. . . . [I]t "enters the trial with the defendant" (but it does not) "go throughout" the trial. . . . [I]t is not itself evidence, much less a "witness" for the defendant. . . . [W]e should not indulge the fiction that it necessarily "goes into the jury room" with the jury. It does not "command" the jury to find the defendant not guilty; it merely requires them to assume his innocence. . . . Indeed, it should yield as to each respective juror as soon as . . . such juror is by the evidence convinced beyond reasonable doubt of the defendant's guilt.¹⁵²

The position in the federal courts, as expressed in *Coffin v. United States*,¹⁵³ was later repudiated by the Supreme Court in *Agnew v. United States*.¹⁵⁴ The federal courts now regard the presumption as requiring evidence of guilt, but do not view it as evidence of innocence. However, the federal law continues to insist, that although it is not evidence, "it is a legal presumption, which they [the jury] must consider along with the evidence . . . when they come finally to pass upon the case."¹⁵⁵

The Ohio Supreme Court, as early as 1877, rejected all evidentiary claims made for the presumption of innocence when it held that "the benefit of the presumption of innocence was fully and

¹⁵⁰ 1 Greenleaf, Evidence § 34 (16th ed. 1899).

¹⁵¹ *Williams v. State*, 241 Ala. 348, 2 So. 2d 423 (1941); *People v. Long*, 407 Ill. 210, 95 N.E.2d 461 (1950); *Commonwealth v. Madeiros*, 255 Mass. 304, 151 N.E. 297 (1926); *Behrens v. State*, 140 Neb. 671, 1 N.W.2d 289 (1941); *Jones v. State*, 13 Tex. Ct. App. R. 1 (1882).

¹⁵² *Carr v. State*, 192 Miss. 152, 156-57, 4 So. 2d 887, 888 (1941). The writer has taken the liberty of rearranging the quoted excerpts.

¹⁵³ *Supra* note 149.

¹⁵⁴ 165 U.S. 36 (1897). See also *Holt v. United States*, 218 U.S. 245 (1910).

¹⁵⁵ *Dodson v. United States*, 23 F.2d 401, 402 (4th Cir. 1928).

practically secured to him [defendant] in the instruction that the state must prove the material elements of the crime beyond a reasonable doubt."¹⁵⁶ The court held the presumption of innocence does not require a charge "that the defendant is, in law, presumed to be innocent of the crime charged against him until every fact necessary to convict him is fully proved."¹⁵⁷

CONFLICTING OR SUCCESSIVE PRESUMPTIONS

Conflicting presumptions occur when each litigant has established basic facts which result in the creation of presumed facts which are inconsistent with each other. Wigmore dislikes the term "conflicting presumptions," explaining that such presumptions are part of the problem of the burden of proof and accurately should be designated "successive presumptions."¹⁵⁸

There are many cases involving conflicting presumptions. The most common instance results from proof of successive marriages by the same spouse. In one case, *W* established that she married *H1* in 1916; that *H1* disappeared in 1923 and was neither seen nor heard from after that time. In 1928, *W* effected a common law marriage with *H2* with whom she lived until *H2* died in 1935 as a result of an accident while working. A child was born as issue of the second marriage. *W* claimed she was *H2*'s widow, and entitled to death benefits under the Workmen's Compensation Laws of New Jersey. *H2*'s employer established that *H1*'s marriage was never dissolved. Obviously, two conflicting presumptions have arisen. In 1928, since only five years have elapsed, there is a presumption of continuance of life with regard to *H1*. On the other hand, there is a presumption that *W*'s marriage to *H2* was valid upon consummation. Is *W* entitled to the death benefits?¹⁵⁹

In *Simpson v. Simpson*¹⁶⁰ conflicting presumptions entered the scene when plaintiff established that *X* was neither seen nor heard of for eight years and therefore was to be presumed dead. Defendant countered by saying that since *X* was concededly alive eight years ago he was still alive by virtue of the presumption of continuance

¹⁵⁶ *Morehead v. State*, 34 Ohio St. 212, 217 (1877).

¹⁵⁷ *Id.* at 216-17. However, Ohio Rev. Code Ann. § 2945.04 (Page 1953) provides that, "In charging a jury the trial court shall state the meaning of presumption of innocence. . . ."

¹⁵⁸ 9 Wigmore, Evidence § 2493 (3d ed. 1940).

¹⁵⁹ See *Sillart v. Standard Screen Co.*, 119 N.J.L. 143, 194 Atl. 787 (Sup. Ct. 1937).

¹⁶⁰ 162 Va. 621, 175 S.E. 320 (1933).

of life. This, of course, is merely a situation where both parties claim opposite presumptions from the same set of basic facts. If one exists, by hypothesis, the other cannot.

Gausewitz, although recognizing that courts sometimes do not follow his rule, contends:

Because both parties cannot have the burden of producing evidence upon the same issue at the same time, there can be no problem of conflicting presumptions. The basic facts of each of the conflicting presumptions operate merely as rebutting evidence of the other presumption, and upon rebuttal each presumption ceases to exist. If the basic fact of one presumption is not sufficient to support an inference and that of the other is sufficient, the party in whose favor the latter operates should prevail if there is no other evidence in the record; but this is because he has the evidence and not because of a presumption.¹⁶¹

Under the Model Code of Evidence conflicting presumptions cannot occur because the presumption merely requires the opponent to introduce contrary rebuttal evidence and when so offered, even in the form of basic facts which result in a conflicting presumption, the proponent's presumption automatically vanishes. Rule 704,¹⁶² according to Gausewitz, merely expresses the position of Thayer which Wigmore approved.¹⁶³ On the other hand, a contrary position, well sustained by many decisions, has been taken, holding, as between conflicting presumptions, the presumption rooted in the stronger policy should triumph. For example, to recall our hypothetical case, "the presumption supporting the validity of the marriage is one founded upon public policy, and upon innocence of crime, and it is well settled that such presumptions overcome the presumption of the continuation of the life of a person even three or four years absent."¹⁶⁴ The ancient rule to that effect is well sustained in modern times, especially where the dissipation of the presumption would result in an inference of criminal conduct or in the birth of an illegitimate child.¹⁶⁵

¹⁶¹ Gausewitz, "Presumptions in a One-Rule World," 5 Vand. L. Rev. 324, 335-36 (1952).

¹⁶² See note 43 *supra*.

¹⁶³ Thayer, Evidence 346 (1898); 9 Wigmore *op. cit. supra* note 158, at § 2493.

¹⁶⁴ Sillart v. Standard Screen Co., *supra* note 159, at 146, 194 Atl. at 788. See also cases in Annot., 14 A.L.R.2d 7, 34-45 (1955); Morgan, "Some Observations Concerning Presumptions," 44 Harv. L. Rev. 906, 941 n.41 (1931).

¹⁶⁵ See Stein v. Stein, 66 Ill. App. 526 (1896); Klein v. Landeman, 29 Mo. 259 (1860).

CONSTITUTIONALITY OF PRESUMPTIONS

There are many instances where legislatures, seeking to give expression to a desired policy, have enacted statutory presumptions. How far can these presumptions go without violating the Constitution?

Wigmore contends that a presumption either imposes a duty to come forward with rebuttal evidence or shifts the burden to the opponent to disprove the presumed fact. Further, these matters are procedural and have always been within the province of the legislature to amend so long as the law does not infringe on judicial prerogatives. He argues that, if the opponent fails to introduce evidence at all and the presumed fact results from proof of the basic fact, the opponent's failure to adduce evidence, not the statute, has brought his downfall. Consequently, the requirement of a rational connection between the basic fact and the presumed fact is unsound and unnecessary.¹⁶⁶ Wigmore's argument may appear logical, but this theory has not received judicial sanction.

The United States Supreme Court, in an early case, *Mobile, J. & K. C. R.R. v. Turnipseed*,¹⁶⁷ upheld a Mississippi statute which provided that proof of injury inflicted by the operation of a train should be prima facie evidence of want of reasonable care on the part of the railroad company's employees, holding that there was no denial of due process so long as there was "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."¹⁶⁸ In this case the law merely cast upon the railroad the duty of coming forward with some evidence to the contrary, whereupon the presumption was extinguished and the jury was left to decide the case on all the evidence. The meaning of the rule in *Turnipseed* can best be seen by its treatment in *Ferry v. Ramsey*,¹⁶⁹ where a minority of the Court would have used it to invalidate a Kansas statute imposing presumptive liability on bank directors for accepting deposits while their bank was insolvent.

In 1929, in *Western & Atlantic R. R. v. Henderson*,¹⁷⁰ a Georgia statute provided that a railroad should be liable for any damage done by the running of a locomotive unless the company should prove that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the

¹⁶⁶ 4 Wigmore, Evidence § 1356 (3d. ed. 1940).

¹⁶⁷ 219 U.S. 35 (1910).

¹⁶⁸ *Id.* at 43.

¹⁶⁹ *Ferry v. Ramsey*, 277 U.S. 88 (1928).

¹⁷⁰ 279 U.S. 639 (1929).

company. This statute, unlike that in *Turnipseed*, transferred the burden of persuasion to the defendant by virtue of a presumption whose basic fact was merely a collision resulting in injuries; and, in addition, gave the presumption the "effect of evidence to be weighed against opposing testimony and . . . [prevalence] unless such testimony is found by the jury to preponderate."¹⁷¹ Distinguishing *Turnipseed*, the Supreme Court held the Georgia statute invalid, stating:

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. . . . The presumption . . . is unreasonable and arbitrary and violates the due process clause. . . ."¹⁷²

Both Holmes and Cardozo went so far as to maintain that even in criminal cases "it is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government."¹⁷³

The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.¹⁷⁴

About a decade later the same Court, speaking through Justice Roberts, agreed that the court's standards for statutory presumptions are these:

The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. . . .

The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more con-

¹⁷¹ *Id.* at 644.

¹⁷² *Id.* at 642-43, 644.

¹⁷³ *Casey v. United States*, 276 U.S. 413, 418 (1928).

¹⁷⁴ *Morrison v. California*, 291 U.S. 82, 88-89 (1934).

venient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship.¹⁷⁵

It thus appears that

a statutory presumption can fix neither the burden of going forward nor the burden of persuasion in either a criminal or civil case unless there is a logical connection between the basic fact and the presumed fact, and in a criminal case even a presumption with the requisite logical connection is invalid if it operates to fix either burden upon defendant unless its application will avoid procedural inconvenience without unfairness or hardship to the defendant.¹⁷⁶

As might be expected, then, the use of presumptions against a defendant in a civil case is more readily accepted and accompanied by fewer constitutional limitations than in a criminal case.

CHARGING THE JURY WHERE PRESUMPTIONS ARE INVOLVED

It is the duty of the court to instruct the jury correctly on the law applicable to the issues, and the duty of the jury to apply that law to the facts as they have found them from the evidence. This requires and assumes that the jury understands the law as set forth in the charge and will apply it correctly to the facts.¹⁷⁷

Where presumptions are involved the task of charging the jury is not an easy one, since it involves the necessity of granting each presumption the recognition it deserves under the law, *i. e.*, of conforming to the decisions as to whether instructions on a particular presumption, under the evidence, should be given at all, and, when given, in what manner. This is a vexing area of the law which has been argued almost endlessly by courts and commentators with much subtle reasoning and very little harmony. One will find in the upper level of research and judgment grave differences of opinion with regard to the answers to questions raised by the charge.¹⁷⁸

¹⁷⁵ *Tot v. United States*, 319 U. S. 463, 467, 469-70 (1943).

¹⁷⁶ Morgan, "The Law of Evidence, 1941-1945," 59 *Harv. L. Rev.* 481, 504 (1946).

¹⁷⁷ Authoritative doubt has been cast upon the validity of this assumption, for candid judges and lawyers will acknowledge that in many cases it is extremely difficult for a jury to comprehend, digest, and correctly apply to the facts the governing principles of law expounded by the court. It is commonly assumed that jurors often refuse to follow that law even where they understand it. Consequently, instruction to the jury as a guide to their conduct is reduced to mere futility if the law is unknowable or unintelligible. See Frank, *Courts on Trial* 122 (1949).

¹⁷⁸ Falknor, "Notes on Presumptions," 15 *Wash. L. Rev.* 71 (1940); McCormick, "Charges on Presumptions and Burden of Proof," 5 *N.C.L. Rev.* 291 (1927); McCormick, "What Shall the Trial Judge Tell the Jury About Presumptions?" 13

Beset by the inherent difficulties of the task, there has resulted an understandable and seemingly irrepressible urge on the part of the courts to adopt one rule for all presumptions. At first blush, this might seem to make the job of the trial judge simple. For example, the Thayer view has been adopted by several courts in response to that urge.¹⁷⁹

However, there are courts that refuse to adopt one rule for all presumptions. They are either bound by precedent as to particular presumptions or have honored important policies which underlie some presumptions. Others recognize the peril of resulting injustice to a litigant in adhering to a one-rule philosophy. It is not unimaginable that those courts that have refused to adopt one rule for all presumptions sense that by the very nature of presumptions there would have to be exceptions to the one rule; that to follow one rule with blind adherence would be ignoring the origin and purposes of many presumptions created by the law.

Despite understandable qualms as to the capacity of the jury to discharge its assigned task, the court must give them the correct instructions when presumptions are in the case. This is not simple, since the correct charge is dependent upon the view adopted by the particular jurisdiction on: (1) the procedural effect of the particular presumption involved in the case; (2) the rule as to the amount and quality of the evidence required to dispel the presumption; (3) the law of the jurisdiction as to whose duty it is, judge or jury, to determine whether the presumption has been liquidated; (4) a correct judgment by the court as to whether the presumed fact can be inferred from the basic fact or facts to permit the issue as to the existence or non-existence of the presumed fact to get to the jury without the presumption.

Those problems set forth confronting the trial court with regard to presumptions in a case can be more readily discerned by the illustration of a hypothetical case.

Let us assume that *O* owns a store and a truck used for delivery purposes. He hires *D*, a driver, to operate the truck and make deliveries. While the truck is in the custody of *D* at 5:45 p.m. on a working day, *D* strikes and injures *T*, who sues *O* for damages. *T* can make a *prima facie* case as to all the necessary elements of his

Wash. L. Rev. 185 (1938); Morgan, "Instructing the Jury on Presumptions and the Burden of Proof," 47 Harv. L. Rev. 59 (1933); Morgan, "Techniques in the Use of Presumptions," 24 Iowa L. Rev. 413 (1939); Morgan, "Further Observations on Presumptions," 16 So. Cal. L. Rev. 245 (1943); Reaugh, "Presumptions and the Burden of Proof," 36 Ill. L. Rev. 819 (1942).

¹⁷⁹ See note 62 *supra*; see also *Tyrrell v. Prudential Ins. Co.*, 109 Vt. 6, 23-24, 192 Atl. 184, 192 (1937); Model Code of Evidence rule 704 (1942).

cause of action except agency, with regard to which he has no direct evidence. However, by virtue of establishing the above basic facts, he has the aid of a presumption that "a truck belonging to the defendant . . . in the custody of the defendant's servant . . . without more, sustains a presumption that the custodian was using it in the course of his employment."¹⁸⁰ The following ramifications result: first, when *T* rests, *O*'s motion for a directed verdict based on no direct proof by *T* of agency will be overruled, for once the basic facts are established, the presumed fact of agency or authority must be assumed. (Agency and scope of authority are hereafter used synonymously.)

Second, if the defendant rested, or if he offered his evidence in the case as to the other issues but introduced no testimony whatsoever on the issue of agency, the court would be compelled to direct a verdict in favor of *T* on the issue of agency, since, under those circumstances, the presumed fact is mandatory on the jury. In a case involving another substantive area of law, a reviewing court reversed a lower court and held in an action to quiet title that, if the defendant by his pleadings admitted plaintiff owned the land prior to filing suit, the presumption of continued ownership of land formerly acquired would apply and the plaintiff would *prima facie* make out his case, thus requiring defendant to come forward with evidence.¹⁸¹ This is also well illustrated in *Basham v. Prudential Ins. Co.*¹⁸² where the beneficiary sued on an insurance policy alleging accidental death. Proof of the basic facts raised the presumption of accidental death and against suicide. The defendant could offer no evidence on suicide. The court held the presumption was mandatory and that an instruction to the jury to that effect was proper.

Under such circumstances there is no need to mention the presumption to the jury. The court need only tell them that for the purposes of their deliberation, they must assume the presumed fact, *i.e.*, that *D* was driving the truck within the scope of his employment.

Third, let us further assume that *O* testified that *D*'s working hours were only until 5:00 p.m. each day and that *D* had no right to be driving the truck at the time of the accident—that *D* was then "on a frolic of his own." Assume that *T* can offer no rebutting evidence on the issue of authority and that both parties rest. *O* moves for a directed verdict, contending that by virtue of his testimony which justifies a finding contrary to the presumed fact, *i.e.*,

¹⁸⁰ *Fiocco v. Carver*, 234 N.Y. 219, 222, 137 N.E. 309, 310 (1930).

¹⁸¹ *Gatrell v. Salt Lake County*, 106 Utah 409, 149 P.2d 827 (1944).

¹⁸² 232 Mo. App. 782, 113 S.W.2d 126 (1938).

that there is no agency, the presumption has been ousted and *T* must fail.

Let us assume further with regard to the above facts, that it is the opinion of the trial judge, correctly or incorrectly, that the basic facts offered by *T* have no sufficient value as evidence of the presumed fact to support an inference of agency.¹⁸³ There being no other evidence on the issue of agency, some courts following Thayer, hold that *O*'s motion should be sustained. The Model Code of Evidence is in full accord, for rule 704(A)(2) provides, "if there is evidence justifying a finding contrary to the presumed fact, the judge instructs the jury that the presumed fact does not exist."

Let us assume, however, that the trial judge decides that there is probative value in the basic facts, which justify an inference of agency by the jury. In that event, the court must overrule *O*'s motion and the case goes to the jury without any reference to the presumption in either a special instruction or a general charge. This is exactly the position taken in *Ayers v. Woodard*, where the court found an inference from the basic facts on the issue of agency. In such case the jury is merely told as part of the charge that they should consider the evidence and that they may, but are not compelled to, find the presumed fact—that the accident occurred within the scope of *D*'s employment.

In Ohio, if the trial court comes to the conclusion that the evidence contrary to the presumption is not substantial credible evidence or "evidence of a substantial nature which at least counterbalances the presumption";¹⁸⁴ or if the case is tried in a jurisdiction that refuses to destroy a presumption by contrary evidence which emanates from an interested witness (*O* or *D*); or if it is in a jurisdiction like California, Oregon, or Montana that treats the presumption as if it were evidence, then *O*'s motion for a directed

¹⁸³ Courts do not always agree whether a certain inference follows from the same set of basic facts. For example, Judge Hand has evidenced a similar opinion with regard to an inference of consent from the mere fact of ownership and custody. *Pariso v. Towse*, 45 F.2d 962 (2d Cir. 1930). Laughlin has taken the opposite view. Laughlin, "In Support of the Thayer Theory of Presumptions," 52 Mich. L. Rev. 195, 213 (1952). In *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938), the Supreme Court found no logical correlation between the basic fact and the presumed fact in a death resulting from violence, so as to permit an inference of accident to go to the jury in the face of adequate rebuttal evidence of suicide by the opponent of the presumption. However, Black, J., in his dissent, said "The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances." 303 U.S. at 176.

¹⁸⁴ *Quaere*: Are these tests one and the same? That is, must the opponent's evidence be substantial credible evidence which at least counterbalances the presumption?

verdict would be overruled and the issue of agency—the existence or non-existence of the presumed fact—would go to the jury. There would be no need to mention the presumption. The Ohio court, after advising the jury generally that the credibility of the witnesses is their province, instructs them that they must find for *T* (because of the presumption) on the issue of agency if *T* has proved the basic facts by the quantity and quality of evidence required and they should find for *O* on that issue if *T* has failed so to prove them, since the court had preliminarily decided *O*'s testimony is not credible evidence of a substantial nature which at least counterbalances the presumption of agency.¹⁸⁵

Fourth, let us further assume that *T* has offered evidence to establish the basic facts but one or more of the basic facts are in issue as a result of *O* and *D*'s testifying that *D* was not hired as a truck driver for *O*, but was only a salesman in *O*'s store who took the truck that day without *O*'s consent, having been specifically told in the past he was not to drive the truck.

Where presumptions are not regarded as evidentiary and the court is the sole judge of whether *O*'s testimony or *D*'s meets the jurisdictional test to rebut the presumption and it so decides, the presumption is thereby automatically expelled from the case. Unless there is other evidence in the case on the issue of agency (offered by *T*) a motion for a directed verdict by *O* would be sustained.

If, on the same set of facts, the judge deems the evidence rebutting the presumption inadequate, the motion for a directed verdict is overruled, and the case goes to the jury. There need be no mention of the presumption; the court merely instructs the jury that if *T* has proved the requisite basic facts they must, in their deliberations, assume as true the presumed fact of agency. Conversely, the court charges that if *T* has not proved the basic facts by the evidence required, the jury must find that agency or authority on the part of *D* does not exist.

If we assume, under either of the hypotheses, that it has been established only that *O* owns the truck and *D* works for him, but not as a driver, which basic facts give rise to an inference (despite the fact that a presumption of authority might also arise, most authorities hold these facts insufficient to raise a presumption), there is no need on the part of the judge to mention anything about the presumption. The judge merely instructs the jury that with reference to the issue of agency they may, but are not compelled to find that *D* was acting within the scope of his employment at the

¹⁸⁵ Cf. *Ayers v. Woodard*, 166 Ohio St. 138, 140 N.E.2d 401 (1957).

time of the accident. The case is treated exactly as if the presumption had never been established.

CONCLUSION: *AYERS* V. *WOODARD*, BOON OR BANE?

Ayers' broad and sweeping language constituted radical surgery on the subject of presumptions, which was suffering from misunderstanding, confusion, and, in many cases, unskillful treatment by the courts. However, the operation may prove worse than the disease, for *Ayers* may well have opened a Pandora's box.¹⁸⁶

The court's opinion, in its eagerness to adopt for Ohio one rule applicable to all presumptions, left much to be desired. As has been heretofore demonstrated, its sweeping language will require judicial interpretation. Well recognized presumptions, either forgotten by the court or inadvertently buried by the comprehensiveness of the language employed in the decision, will require subtle disinterment and subsequent annexation as exceptions to the pronounced rules governing presumptions. Otherwise, the opinion will prove to be completely at odds with well established law. It is questionable whether the court intended to go so far.

The ultimate result of *Ayers* and its "rule of disappearing presumptions," as heretofore pointed out, is that the trial judges now have the power to determine whether evidence contrary to a presumption is sufficient to take from the jury the right to render a verdict on evidence which, had the judge not found it overcome by contradictory evidence, would have justified a verdict.

Unless the decision and law with regard to presumptions is mere dictum, *Ayers* brought about the following: (1) reversed, sub silentio, a long line of cases on what is required to eliminate a presumption from a case; (2) emasculated the power of the jury to give full force and effect to a presumption, and the reasons for its creation, by taking from the jury the authority to find that evidence contrary to a presumption was insufficient to repel it, substantially narrowing the usual province of the jury with regard to the determination of credibility of witnesses;¹⁸⁷ (3) imposed additional

¹⁸⁶ The recent case of *In re Breece*, 173 Ohio St. 542, 184 N.E.2d 386 (1962), in the opinion of this writer, merely confirms the difficulties that beset the trial judge when he is burdened with the rule of disappearing presumptions. *Breece* gives very little help to the trial court already bewildered by its responsibility with regard to presumptions, especially in view of the fact that the court stated and relied upon cases decided both before and after *Ayers* in support of its judgment. See *Charging the Jury Where Presumptions Are Involved*, *supra* at 214.

¹⁸⁷ Mr. Justice Black, in *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938), protested the Court's impinging upon the province of the jury. Black contended that once a presumption enters a case, contrary evidence, regardless of its

burdens on the trial court by encumbering it with the responsibility of determining if the facts and evidence in the case give rise to an inference; and, if not, whether the evidence of the opponent of the presumption is substantial, credible evidence at least counterbalancing the presumption; (4) left undefined the terms "substantial" and "credible"; (5) held an inference is "substantial credible evidence"; (6) disregarded, perhaps quite unintentionally, the impact of the decision on the presumptions of legitimacy, innocence, validity of a will upon probate, the statutory presumption of transfers in contemplation of death and the presumption with regard to receipt of a letter when properly addressed. These presumptions, as has been noted, either shift the burden of proof or require some explanation to the jury and are not automatically eliminated upon the introduction of "substantial credible evidence."

Perhaps Ohio could simplify the entire subject by adopting legislation similar to that of California, Oregon, and Montana. These states, which have enacted practically similar statutes, have

strength, cannot wipe it out and thus deny the jury the right to determine the issue as to the existence of the presumed fact.

Proof of death by external or violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this *proof of accidental death* was based on "presumption," in reality . . . what is meant is that a litigant has offered adequate evidence to establish accidental death. To attribute this *adequacy of proof* to a "presumption" does not authorize or empower the judge to say that this "adequate proof" (identical with legal "presumption") has "disappeared." If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere *contradictory* evidence cannot overcome the original "adequate proof" unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof. The *jury*—not the *judge*—should decide when there has been "substantial" evidence which overcomes the previous adequate proof. Here, this Court holds that at the conclusion of plaintiff's evidence, the jury had adequate proof upon which to find accidental death, and which would authorize a verdict that insured died as a result of accident, but also holds that, after subsequent contradictory evidence of defendant, the judge (not the jury) could decide that plaintiff's adequate proof (presumption) had "disappeared" or had been overcome by this subsequent contradictory testimony. This took from the jury the right to decide the weight and effect of this subsequent contradictory evidence. Such a rule gives parties a *trial by judge*, but does not preserve, in its entirety, that *trial by jury* guaranteed by the Seventh Amendment to the Constitution. I can not agree to a conclusion which, I believe, takes away any part of the constitutional right to have a jury pass upon the weight of *all of the facts* introduced in evidence.

Id. at 176-77 (dissenting opinion).

made presumptions, by definition, a form of evidence;¹⁸⁸ each has listed in the statute about forty of the common presumptions; each has declared by judicial construction that, as a result of the statutory definition of evidence, except in rare instances, only the jury can determine if the presumption has been overcome.

Montana has gone as far as to hold that the evidence of the opponent of the presumption must preponderate to destroy the presumption. As a result, in those states, the presumption cannot be uprooted by the introduction of contrary evidence; it goes to the jury with other evidence of the proponent of the presumption, and if there is no evidence other than the presumption on the presumed fact offered by the proponent of the presumption, the jury, not the court, decides whether the presumption has been extinguished by the contrary evidence.

Construing the Montana Code, the court declared that:

Section 10604 clearly means that when positive evidence appears it stands on one side and the presumption on the other, and the trier of fact must weigh them both in determining the question. This court has adhered to this view throughout its history. The rule that the presumption stands even though controverted is not necessarily based on a theory that it is evidence itself, but upon the statutes. The legislature may define the effect of the presumption as it has and even though, strictly speaking, it is not itself evidence, there is no reason why the legislature cannot require that a proven fact out of which the presumption arises be given certain probative value which has the effect of evidence. . . .

We can not say, under the Montana rule, that the circumstantial evidence adduced by the defendant standing alone preponderates against the circumstantial evidence adduced in behalf of the plaintiff when aided by the presumption.¹⁸⁹

California, Montana, and Oregon, as a result of their legislation on presumptions, have obviated many problems. First, the judge need not be concerned, as *Ayers* requires, with the task of correctly determining whether an inference as to the presumed fact can be drawn from the basic facts—not always an easy decision to make. Secondly, the trial judge need not worry about whether the contrary evidence that eliminates the presumption is “substantial” or “credible” or counterbalances the presumption. That is the exclusive function of the jury. Third, since the presumption reaches the jury,

¹⁸⁸ See Cal. Code Civ. Proc. §§ 1957, 1961, 2061; Ore. Rev. Stat. 41.310 (1963); Rev. Codes of Mont. tit. 97-301-5 (1947).

¹⁸⁹ *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 163, 165, 124 P.2d 579, 584, 585 (1942).

the judge need not be fearful of error when he mentions the presumption to the jury.

Under the present Ohio law, on the other hand (if the *Ayers* pronouncements on presumptions are not regarded as dicta), it is within the province of the trial court to determine the following: first, that the opponent of the presumption is entitled to a directed verdict with regard to the non-existence of the presumed fact if reasonable minds can arrive at only one conclusion as to the non-existence of the presumed fact. This was the position taken where evidence was introduced contrary to the presumed fact in a case where the opponent of the presumption had offered testimony proving that the assured was alive, thus liquidating the presumption of death after seven years of unexplained absence.¹⁹⁰ A directed verdict was also granted to the opponent of the presumption of accidental death when the opponent offered evidence that the death resulted from suicide, which evidence the reviewing court found as a matter of law to be of such quality that reasonable minds could only arrive at one conclusion, that is, that the presumed fact of accidental death did not exist.¹⁹¹ The *Ayers* test would require the same ruling in both cases.

Second, the trial court may determine that the basic facts give rise to an inference of the presumed fact. In this situation, such inference can constitute "substantial credible evidence," resulting in no need for the trial court to treat the case as containing a presumption. In fact, under such circumstances, it is error for the court in its general charge or in requested instructions to mention the existence of the presumption.

Third, the court may determine that where a party has sought the aid of the presumption by non-production of evidence with regard to the presumed fact and the opponent of the presumption introduces evidence contrary to the presumed fact, the court must determine whether such evidence is of a substantial credible nature which at least counterbalances the presumption. If the court finds that it is, the presumption goes out of the case.

Ayers did not specifically say the judge must make that preliminary finding. However, if the trial court can and must eliminate the presumption from the case because the basic facts are susceptible of an inference with regard to the presumed fact, it must follow that it is likewise within the province, as well as the duty, of the trial court to decide whether (though it finds no infer-

¹⁹⁰ *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 84 N.E.2d 504 (1949).

¹⁹¹ *Sheppard v. Midland Mut. Life Ins. Co.*, 152 Ohio St. 6, 87 N.E.2d 156 (1949).

ence with regard to the presumed fact from the basic facts, such as would eliminate the presumption) the evidence offered by the opponent of the presumption contrary to the presumed fact is nevertheless "substantial credible evidence," and thus oust the presumption from the case.

It would then appear, because of what has been determined above, that if the trial court decides that the evidence of the opponent of the presumption is not credible evidence of a substantial nature which at least counterbalances the presumption, the force of the presumption has not been repelled. However, since there is such antagonism to the use of the word "presumption" to the jury, the trial judge need not mention the presumption to the jury, but merely instruct them that if they find that the proponent of the presumption has proved the basic facts by a preponderance of the evidence, they must assume that the presumed fact is true; and, conversely, if the proponent has not done so, then the presumed fact does not exist and, if its proof is essential to the proponent's case, they must find for the opponent of the presumption.¹⁹²

Finally, the court may hold there is no inference deducible from the basic facts, and that the evidence offered by the opponent of the presumption is "substantial credible evidence which at least counterbalances the presumption" and which wipes out the presumption created by proof of the basic facts. The above conclusion

¹⁹² *Ayers* says once the presumption is eliminated it is error to mention it to the jury, following *Thayer* and the Model Code of Evidence. This attitude is approved by *Chamberlyne*, 2 *Chamberlyne*, Evidence § 1085 (1911), and is reflected in several opinions. See Note, 37 Minn. L. Rev. 629 (1953); Note, 24 Minn. L. Rev. 651 (1940). Judge Hand claims that, "If the trial is properly conducted the presumption will not be mentioned at all." *Alpine Forwarding Co. v. Pennsylvania Ry.*, 60 F.2d 734, 736 (2d Cir. 1932). *McCormick* contends

that this practice of keeping silent about the relevant presumptions in a case, where the facts are disputed and must be submitted to a jury, abandons one of the judge's useful opportunities . . . there are some situations in which instructions on presumptions are essential and others in which the giving of such instructions may often be expedient.

McCormick, Evidence § 314 (1954). The practice of informing a jury of presumptions is followed constantly in many states and is supported by some persuasive opinions. See *Hamilton v. Southern Ry.*, 162 F.2d 884 (4th Cir. 1947); *Wellish v. John Hancock Mut. Life Ins. Co.*, 293 N.Y. 178, 56 N.E.2d 540 (1944); *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P.2d 227 (1944); *Karp v. Herder*, 181 Wash. 583, 44 P.2d 808 (1935); *Worth v. Worth*, 48 Wyo. 441, 49 P.2d 649 (1935). According to *McCormick*, "The form books are replete with instructions and unquestioning acceptance of the practice of informing the jury of the presumption despite the fact that countervailing evidence has been adduced." *McCormick, op. cit. supra* at 667 nn.13 & 14.

is a corollary of *Ayers* which holds the trial judge can find an inference from the basic facts, which inference constitutes the "substantial credible evidence" required to eliminate the presumption from the case.

L'ENVOI

The writer, as his former professor of evidence, Edmund Morgan, prophetically predicted, "approached the topic of presumptions with a sense of hopelessness and has left with a feeling of despair." Despite the experienced warning, one is sometimes impelled to make the effort, futile though it might be. The author's effort, perhaps, can be justified and his qualms find comfort in the wisdom of a beloved judge who, more than thirty-five years ago graphically described in the following words his feelings of futility and frustration when afflicted with some of the perplexing problems of the law:

"They do things better with logarithms." The wail escapes me now and again when after putting forth the best that is in me, I look upon the finished product, and cannot say that it is good. In these moments of disquietude, I figure to myself the peace of mind that must come, let us say, to the designer of a mighty bridge. The finished product of his work is there before his eyes with all the beauty and simplicity and inevitableness of truth. He is not harrowed by misgiving whether the towers and piers and cables will stand the stress and strain. His business is to know. If his bridge were to fall, he would go down with it in disgrace and ruin. Yet withal, he has never a fear. No mere experiment has he wrought, but a highway to carry men and women from shore to shore, to carry them secure and unafraid, though the floods rage and boil below.

So I cry out at time in rebellion, "why cannot I do as much, or at least something measurably as much, to bridge with my rules of law the torrent of life?" . . .

I know the common answer to these and like laments. The law is not an exact science, we are told, and there the matter ends, if we are willing there to end it. One does not appease the rebellion of the intellect by the reaffirmance of the evil against which intellect rebels. Exactness may be impossible, but this is not enough to cause the mind to acquiesce in a predestined incoherence. Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes.¹⁹³

¹⁹³ Cardozo, *The Paradoxes of Legal Science* 1-3 (1927).